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No. _____

In the Supreme Court of the United States

KAREN WINTERS,

Petitioner,

v.

MTL SYSTEMS, INC. AND ARNOLD FIFE AND JAMES MCCRACKEN

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e et seq., *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, and *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, the existence of an anti-harassment policy with complaint procedure and an employer's adequate response to a supervisor's sexual harassment by itself insulates the employer from liability for that sexual harassment.

2. Whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e et seq., *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, and *Faragher v. City Of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, an employer is precluded from asserting an affirmative defense when an employee does not unreasonably fail to take advantage of any preventive or corrective opportunities provided by the employer.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Karen Winters, an individual citizen of the United States, residing in the Western District of Ohio. Plaintiff has no corporate affiliations. Karen Winters was the Plaintiff in the District Court, and the Appellant in the Sixth Circuit Court of Appeals.

Respondents

Respondent MTL Systems, Inc. is a corporation which is publicly traded. Petitioner is unaware of any publicly held company owning ten (10) percent or more of said corporation's stock. MTL Systems, Inc. was one of the Defendants in the District Court, and one of the Appellees before the Sixth Circuit Court of Appeals.

Respondent Arnold Fife is/was MTL's Systems, Inc.'s President. Arnold Fife was one of the Defendants in the District Court, and one of the Appellees before the Sixth Circuit Court of Appeals.

Respondent James McCracken is/was an employee of MTL Systems, Inc. and was Petitioner's supervisor. James McCracken was one of the Defendants in the District Court, and one of the Appellees before the Sixth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. A at la) is reported at *Karen L. Winters v. MTL Systems, Inc., et al.* (6th Cir. 2002), 39 Fed. Appx. 985, 2002 U.S. App. LEXIS 14319. The District Court opinion (App. B at 6a) is reported as *Karen L. Winters v. MTL Systems, Inc., et al.,* Case No. C-3-97-454, F.Supp. (S.D. Ohio 1999).

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on July 12, 2002. No petition for rehearing was filed. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This case involves Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, prohibiting discrimination in employment. Section 703(a) of Title VII forbids an employer, among other things:

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's...sex." 42 U.S. C. §2000e-2(a)(1).

STATEMENT OF THE CASE

Karen Winters brought this action against her employer, MTL Systems, Inc., and her supervisor, James McCracken, for sexual harassment and sex discrimination under Title VII, and state torts, including breach of employment contract, promissory estoppel, invasion of privacy, retaliation and emotional distress. With regards to her sexual harassment claim, the district court at summary judgment found that questions of fact remained as to whether Winters' supervisor, James McCracken, subjected her to hostile work environment sexual harassment (dismissing her claim against McCracken without prejudice), but found that Winters' employer, MTL Systems, Inc., was not liable for sexual harassment of Winters by McCracken because MTL Systems took reasonable steps to prevent sexual harassment and to cure what it was told had happened.

Winters appealed the district court decision to the Sixth Circuit. The panel of judges assigned to the case ruled against Winters and affirmed the district court's decision by simply reiterating certain case facts and then stating that it had reviewed all materials and briefs and that the decision was mandatory as a matter of law in one paragraph. No further explanation or analysis was provided.

Shortly after Winters began her employment with MTL Systems, Inc., her supervisor, McCracken, began propositioning her for sex and otherwise creating a hostile work environment by talking about sex, discussing his own marital sexual problems, telling sexual-content jokes, touching Winters at every opportunity, asking Winters out to dinner, and offering her a promotion to be his special assistant when

he took over the proposed INTELLX division of MTL[1]. Because of this unwelcomed harassment, Winters complained to John Ream (MTL's Vice President of Administration) and Sue App (MTL's Human Resource Manager).

There is no question that McCracken was a supervisor with immediate (or successively higher) authority over Winters, and no tangible employment action was taken against Winters.[2] Significantly, it is equally clear that Winters did not unreasonably delay or fail to take advantage of any preventive or corrective opportunities provided by MTL Systems, Inc. or fail to take appropriate action to avoid harm otherwise. Under the *Ellerth / Faragher* framework, this fact alone should have precluded any attempt by MTL Systems, Inc. to assert the affirmative defense and thus exposes the district court and Sixth Circuit's excusal of MTL Systems, Inc. solely on the basis of its grievance system and prompt response as in error.

However, the district court and Sixth Circuit focused solely on MTL's actions in taking reasonable care to prevent the sexual harassment and curing any incidents which happened, without determining that Winters unreasonably failed to avail herself of MTL's complaint procedures.

---

[1] The district court found, and the Sixth Circuit affirmed, that "[g]iven the totality of the circumstances test, the Court cannot say that all of this behavior taken together, could not be found by a reasonable jury to constitute sexual harassment sufficiently pervasive to make the workplace abusive." Page 11, District Court.

[2] Petitioner does dispute the issue of whether she suffered a tangible employment action, but for clarity and efficiency purposes of this petition, she will not further address that issue.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Court of Appeals Has Decided An Important Question of Federal Law in a Way That Conflicts With This Court's Decisions in *Burlington v. Ellerth* and *Faragher v. City of Boca Raton* and Has Entered a Decision in Conflict With Decisions of Other U.S. Court of Appeals on the Same Important Matter

"Most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims." *Burlington Industries, Inc. v. Ellerth* (1998), 524 U.S. 742, 760 citing *Gary v. Long*, 59 F.3d 1391, 1397 (CADC 1995). Moreover, most forms of discrimination are relatively easy to attribute to the employer because an employee who has the authority to "fail or refuse to hire or to discharge...or otherwise to discriminate against any individual with respect to his compensation" is clearly an "agent" of the employer. 42 U.S.C. §2000e-2(a)(1), §703 (a)(1).

In *Meritor Savings Bank FSB v. Vinson*, 477 US. 57 (1986), this Court addressed, but did not resolve, the issue of under what circumstances an employer is liable for harassment that occurs in the employer's place of business. This Court in *Vinson* did, however, agree that "Congress wanted courts to look to agency principles for guidance in this area." *Meritor* at 72. The application of common law agency principles by the lower courts after *Meritor* proved less straightforward than the Court may have anticipated, generating considerable confusion, and a variety of approaches. *See* Charles A. Sullivan, Michael J Zimmer &

Rebecca Hanner White, *Employment Discrimination Law and Practice*, Third Edition, Vol. 2, p. 469 (1997).

In 1998, this Court returned to the issue of employer liability in two opinions designed to definitely establish the appropriate standards for employer liability in cases where a supervisor creates a sexually hostile working environment without imposing any tangible job detriment.

In *Burlington Industries, Inc. v. Ellerth,* 524 US. 742 (1998), and its companion case, *Faragher v. City of Boca Raton* 524 US. 775 (1998), this Court looked to the *Restatement (Second) of Agency* for governing principles for employer liability for harassment. As relayed in *Ellerth* by this Court, while §219(1) of the Restatement makes a master "subject to liability for the torts of his servants committed while acting in the scope of their employment," *Ellerth* recognized that rarely will sexual harassment fall within the scope of an agent's employment. *Ellerth* 524 US. at 757; *Restatement (Second) of Agency* §(219)(1) (1958). This Court also recognized that most of the alternative provisions of §219(2) would usually not apply, but held that paragraph (d) reached sexual harassing conduct when "the employee...was aided in accomplishing the tort by the existence of the agency relation."

This "aided in the agency relation standard," however, "requires the existence of something more than the employment relation itself." *Ellerth,* 524 US. at 760. This Court explained the application of this test both when a "tangible employment action" is taken and when there is not tangible harm.

In formulating the appropriate standard, this Court indicated that, beyond pure agency considerations, its rule

ought to reflect Title VII's concern with "the creation of antiharassment policies and effective grievance mechanisms," especially "Congress' intention to promote conciliation rather than litigation in the Title VII context and the EEOC's policy of encouraging the development of grievance procedures." *Ellerth,* 524 US. at 764. Furthermore, [t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." *Id.* To accommodate these concerns, the *Ellerth* Court announced its holding, consistent with *Faragher,* setting forth the standard for determining employer liability for supervisor harassment in a case in which no tangible job detriment had occurred:

> **An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.** When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense **comprises two necessary, elements:** (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, ***and*** **(b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.** *Id.* [Emphasis added to original]

The Court then elaborated on both elements, specifically stating with regards to the second element:

> And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense, *Id.* at 765.

While some lawyers, judges and legal scholars believe the decisions of *Faragher* and *Ellerth* may have left a number of questions unanswered, the Court was clearly attempting to provide lower courts and employers specific guidance on how to handle sexual harassment claims. What is clear from the Court's 1998 decisions is that a vicarious liability standard is to be applied subject to an affirmative defense which an employer must prove both prongs. Several circuits have followed this rule. *See generally* David Sherwyn, Michael Heise, & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline." An Empirical Examination of the Flaws in the Affirmative Defense to Sexual Harassment Charges,* 69 Fordham L. Rev. 1265 (2001). For example, in addressing the summary judgment motion of an employer in *Moore v. Sam's Club*, 55 F.Supp.2d 177 (S.D. NY 1999), the court there first held that Sam's Club had exercised reasonable care both in formulating its policy and in responding to the complaint. *Moore* at 191. The court then held, however, that Sam' s Club could not prevail on the second prong of the defense because the plaintiff took full advantage of the preventative measures provided, and therefore had not acted unreasonably. *Id.* at 192. Thus, Sam's Club did everything it could have, but lost because the plaintiff also had acted appropriately.

Further, in *Watts v. Kroger Co.*, 147 F.3d 460 (5th Cir. 1998), the Fifth Circuit affirmed summary judgment in favor of the employer on the ground that the employer took prompt remedial action after Watts complained to her store manager that her supervisor was harassing her. After the *Ellerth* decision was handed down, however, the Fifth Circuit withdrew its opinion and subsequently reversed its judgment on the grounds that the employer could not, as a matter of law, establish that Watts "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."

In addition to the majority's opinion in *Ellerth,* other associate justices of the Supreme Court have interpreted the *Ellerth* and *Faragher* decision to mean that an employer cannot possibly prevail on a summary judgment motion in a ease in which the employee reported the alleged harassment. For example in his dissenting opinion in *Ellerth* (at p. 766-67), Justice Thomas interpreted the majority and concurring opinions as holding that an employee who reports sexual harassment cannot, as a matter of law, be found to have failed unreasonably to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. Justice Thomas also opined at page 773 in *Ellerth* that "employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm". Therefore it is clear that once an employee reports sexual harassment- the affirmative defense is unavailable.

Before *Ellerth,* courts were allowed to hold that an adequate response to a supervisor's harassment by itself insulated the employer from liability for that harassment. Under *Ellerth,* however, such an employer is still liable if the

employee reasonably utilized an employer's complaint procedure or avoided harm. *See Moore v. Sam's Club* and *Watts v. Kroger Co. infra.*

In the instant case, even assuming that MTL Systems, Inc. could establish that it acted reasonably to prevent and correct violations, the *Ellerth* defense still required MTL Systems, Inc. to demonstrate that Karen Winters "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."

The district court ruled (and the Sixth Circuit affirmed) that "[t]o avail itself of the *Ellerth-Faragher* defense, an employer must show that it took reasonable care to prevent sexual harassment and to cure any incidents which happened." *See* page 11-12, District Court's opinion. The lower court then analyzed this prong of *Ellerth / Faragher* only for two pages, concluding that MTL was not liable for sexual harassment of Winters by McCracken "[b]ecause MTL took reasonable steps to prevent sexual harassment and to cure what it was told had happened..." *See* page 14, District Court's Opinion.

The district court and Sixth Circuit stopped their analysis with the first prong of the defense, and neither found nor analyzed whether Winters "unreasonably failed to take advantage of any preventive or corrective opportunities provided" by MTL or, similarly, that her report of sexual harassment was untimely or otherwise defective. By cherry-picking only one of the two joint elements of the defense, and ignoring the evidence provided that Winters reasonably used MTL's opportunities (i.e., complaining to Vice President John Ream and Human Resource Director Sue App), the district court and Sixth Circuit have decided an important question of federal law in a way that conflicts with this

Court's rulings, and such decision flies directly in the face of identical statements to the contrary, in *Faragher and Ellerth.* The district court and the Sixth Circuit simply drafted result-oriented opinions which comported to their conclusions, which were based exclusively on MTL's Systems, Inc.'s actions (i.e., prevention and response to harassment) using the language of *Ellerth* and *Faragher* but failing to account for both prongs of the affirmative defense.

Ellerth and *Faragher* are controlling authority on this issue in the Sixth Circuit. Nonetheless, the Sixth Circuit's affirmance of the district court's decision is contrary to, and is a departure from, the law set forth by this Court in *Ellerth* and *Faragher,* and also conflicts with decisions of other U.S. Court of Appeals on the same important matter. It further ignores United States Supreme Court precedent and this Court's bestowing on lower courts and employers of specific guidance on how to handle sexual harassment claims. The decision is incorrect and erroneous as a matter of law. The district court's decision, affirmed by the Sixth Circuit, does not accomplish the goals and principles set forth by *Ellerth* and *Faragher.*

II. The Questions Presented Are Important

Because circuits, such as the Sixth, are issuing result-oriented decisions and focusing mostly (if not exclusively) on the employer's preventive policies and corrective action taken in response to complaints of sexual harassment, the goals, principles and guidance set forth in *Ellerth* and *Faragher* are not being accomplished or followed. *Ellerth and Faragher* are controlling authority on this issue in the Sixth Circuit but have been ignored by the district court and the Sixth Circuit. Furthermore, the Sixth Circuit's affirmance of the district court' s decision is contrary to, and is a departure from, the

law set forth by this Court in *Ellerth* and *Faragher*. It further ignores United States Supreme Court precedent and this Court's bestowing on lower courts and employers of specific guidance on how to handle sexual harassment claims. The decision is incorrect and erroneous as a matter of law.

The district court and Sixth Circuit's decision stands in the way of providing justice to Karen Winters by failing to remedy and correct the discrimination and harassment Ms. Winters' supervisor and employer subjected her to, during her employment. The decision simply does not make her whole because the perpetrator is profiting, not the victims. This result is clearly contrary to Congressional intent and Supreme Court precedent.

III. The Decision of the Sixth Circuit Adversely Impacts Members of Protected Classes, and Eradicates the Benefits of Title VII

Sexual harassment is the use of a woman's sexuality as a metaphor for discrimination to drive women off the job. *See* Barbara Lindermann & David D. Kadue, *Sexual Harassment In Employment Law* (1992), foreword by Hon. Alex Kozinski. In our society the employees least able to protect themselves in the workplace are persons who are members of protected classes, such as women, who are harassed and discriminated against with respect to the terms, conditions or privileges of their employment because of their sex. Nowhere is this more apparent than with sexual harassment in the workplace.

An important part of the legacy of *Faragher* is not merely the recognition that traditional agency principles make employers liable for the discriminatory behavior of their supervisory employees, but rather that the behavior that Title VII aims to preclude is behavior that unfairly keeps women

out of the workplace by making it too hostile for them to stay there. Benjamin E. Griffith, *Sexual Harassment in the Public Workplace* (2001), at p. 9. Its provision of an affirmative defense for environmental claims not involving tangible job detriments illumines what the Court sees as the purpose of Title VII: not merely to permit lawsuits, but rather to encourage an end to discrimination in the workplace by putting a price tag on anything short of zero-tolerance, *Id.*

The Sixth Circuit's decision impacts female employees' rights to protect themselves, and seek remedy for, such harassment and discrimination by supervisors who are aided by (1) their authority and ability to hire, fire and affect the terms and conditions of female workers and (2) their proximity and regular contact which affords them access to a captive pool of potential victims.

The Supreme Court needs to accept *certiorari,* and bring the Sixth Circuit into compliance with 42 U.S.C. §2000e, Title VII of the Civil Rights Act of 1964, as well as this Court's decisions in *Ellerth* and *Faragher*.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 00-4313

[Filed July 12, 2002]

KAREN L. WINTERS, Plaintiff-Appellant,	)
v.	)
MTL SYSTEMS, INC., et al., Defendants-Appellees.	)

On Appeal from the United States District Court for the Southern District of Ohio

JUDGES:
Before KRUPANSKY and BOGGS, Circuit Judges; LAWSON,* District Judge.

OPINION

PER CURIAM. Plaintiff-Appellant Karen Winters ("Winters") has challenged the district court's award of

* The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

summary judgment to Defendants-Appellees MTL Systems, Inc. ("MTL"), Arnold Fife ("Fife"), and James McCracken ("McCracken") in her gender discrimination and harassment action.

In 1995, Winters applied for a position, Administrator for the Computer Simulation Division, with MTL. At her interview, Winters spoke with several MTL employees, including McCracken. After the interview, McCracken phoned Winters and offered the position, which Winters accepted.

On September 27, 1995, Winters began work at MTL. At all times relevant to the case, McCracken was Winters' supervisor. In the late winter of 1996, Winters received a summons from the Greene County, Ohio Common Pleas Court for grand jury service. Winters informed MTL of the summons and began her term of service with the Greene County grand jury in March of 1996.

On March 8, 1996, Winters informed John Ream ("Ream"), MTL's Vice President of Administration, that McCracken had made unwelcome advances and that she felt uncomfortable around him. Ream encouraged Winters to contact Sue App ("App"), MTL's Manager of Human Resources. Ream assured Winters that she would not be discharged for making a complaint.

Ream then called App and informed her of the allegations against McCracken. App then requested a meeting with Winters to discuss the charges. App then asked Winters to call her if Winters had any further problems. App confronted McCracken with these allegations and asked him

to respond to each individually. App then instructed McCracken to avoid being alone with Winters and to maintain physical distance between them. App also warned McCracken against discussing things of a personal nature with Winters.

Both Ream and App informed Fife, MTL's President, about Winters' allegations. Fife then met with McCracken and cautioned him as had App. Over the next couple of months, App and Ream visited Winters' work area unannounced to ensure that the matter had been resolved. Neither saw anything questionable. In addition, App and Fife spoke to several employees in Winters' work area, none of whom confirmed Winters' allegations.

Shortly after making her sexual harassment allegation, in March of 1996, Winters reported for grand jury duty. Winters claimed over the next five months that she was serving on the grand jury, charging over two-hundred hours to grand jury service on her time cards. According to App and Fife, in August of 1996, Herb Hirsch, an engineer in Winters' division, complained to App that Winters' absences were taking a toll on the division.[1] App asked Fife to contact the Greene County Prosecutor's office to obtain Winters a discharge from grand jury service.

Fife phoned the prosecutor's office and spoke with Assistant Prosecutor Dave Mesaros ("Mesaros"). Fife asked Mesaros if he could excuse Winters from further service. Mesaros checked into the situation and discovered that

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[1] Hirsch has speculated that he initially talked to Fife in April of 1996 about the toll Winters' grand jury service was exacting on the division.

Winters had not served on the grand jury since April of 1996. Fife told Mesaros that Winters had provided MTL with written excuses from the prosecutor's office which verified her grand jury service. Suspecting that the excuses were forged, Mesaros asked Fife to fax all such excuses to him. Mesaros then asked Detective David Potts ("Potts") of the Beavercreek, Ohio Police Department to investigate Winters for theft and forgery.

On August 26, 1996, Detective Potts and a fellow officer went to MTL and escorted Winters to the Beavercreek police station. Detective Potts questioned Winters about her grand jury service. Winters confessed to lying to MTL, falsifying her time cards, and forging excuses from the prosecutor's office. In her conversation with Detective Potts, Winters claimed that she stayed at home to avoid McCracken and that she had attempted to do her work from home.

MTL then placed Winters on administrative leave. On the same date, August 26, 1996, Fife issued a memo to MTL employees:

> Beavercreek detectives have questioned Ms. Winters about time spent on Grand Jury duty the past five months. We have little information to offer at this time, however, when we know more we will share it with you. Ms. Winters has been placed on Administrative Leave until this issue has been cleared up.

> In the meantime if you are contacted by Ms. Winters, do not discuss this or any other issue that involves MTL with her.

On August 29, 1996, Winters was indicted on grand theft and forgery. On August 30, 1996, Fife terminated Winters' employment with MTL. On September 3, 1996, Fife issued a second memo to employees:

> Karen Winters has been indicted by the Greene County Grand Jury and charged with theft and forgery. Ms. Winters' employment with MTL Systems has also been terminated for falsification of time cards.

On November 20, 1996, after being advised of her rights, Winters pled guilty to both charges. The court sentenced Winters to two years in prison, but then suspended the sentence for a probationary period in which Winters was to pay restitution to MTL and to perform one hundred hours of community service. Several newspapers reported Winters' indictment and guilty plea.

On February 19, 1997, Winters filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), claiming sexual harassment and discrimination. On July 15, 1997, the EEOC issued Winters a Notice of Right to Sue.

On October 10, 1997, Winters filed a complaint in federal court, advancing seven claims: (1) sexual discrimination; (2) sexual harassment; (3) retaliation; (4) breach of contract; (5) promissory estoppel; (6) infliction of emotional distress; and (7) invasion of privacy. In addition to

declaratory relief and backpay, Winters requested $6,750,000 in compensatory damages and $8,500,000 in punitive damages.

On June 30, 1999, MTL and Fife filed a motion for summary judgment. On the same date, McCracken filed a motion for summary judgment. Confronted by motions for summary judgment by the defendants-appellees, the district court referred the case to a magistrate judge for report and recommendation. On December 7, 1999, the magistrate judge recommended dismissal of Winters' action, concluding that Winters had not adduced evidence supporting her various claims. On September 20, 2000, the district court adopted the magistrate judge's recommendation and dismissed the case.[2] On October 18, 2000, Winters timely appealed.

This court has carefully reviewed the materials contained in the Joint Appendix and the arguments presented in the briefs of counsel submitted by the parties and concludes that the district court's award of summary judgment to the defendants was mandatory as a matter of law. This reviewing court therefore adopts the magistrate judge's well-reasoned report and recommendation entered December 7, 1999.[3]

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[2] Per the magistrate judge's recommendation, the district court dismissed Winters' state law claim of sexual harassment against McCracken without prejudice. Winters has not challenged that ruling before this court.

[3] Winters has advanced a number of challenges to the magistrate judge's evidentiary rulings. After a thorough review of Winters' contentions, this court finds that the magistrate judge did not abuse his discretion.

Accordingly, the judgment of the district court is **AFFIRMED.**

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-97-454

[Filed December 7, 1999]

KAREN WINTERS,)
Plaintiff,)
)
v.)
)
MTL SYSTEMS, INC., et al.,)
Defendant.)
)

District Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

REPORT AND RECOMMENDATIONS

This case is before the Court on Motions for Summary Judgment of Defendants MTL Systems, Inc., and Arnold L. Fife, Sr. (Doc. #246) and Defendant James McCracken (Doc. #249). Plaintiff has filed a combined Memorandum in Opposition (Doc. #264) and Defendants have filed Reply Memoranda (Doc. ##282, 285).

Allegations in the Amended Complaint

Plaintiff brought this action pursuant to Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e), and Ohio Revised Code § 4112.99 (Amended Complaint, Doc. #126, ¶¶4, 5). The Amended Complaint alleges that Plaintiff was employed by Defendant MTL Systems, Inc., on or about September 27, 1995, and was at all times during her employment supervised by Defendant James McCracken (*Id.*, ¶¶ 7-8). Shortly after her employment began, she alleges Defendant McCracken began propositioning her for sex and otherwise creating a hostile work environment by talking about sex, discussing his own marital sexual problems, telling sexual content jokes, touching Plaintiff at "every opportunity", asking Plaintiff out to dinner, and offering her a promotion to be his special assistant when he took over the proposed INTELLX division of MTL (*Id.*, ¶¶ 10-11).

On or about March 8, 1996, Plaintiff complained of the sexual harassment to John Ream, MTL's Vice President of Administration; she alleges that several weeks later she complained again to Sue App, MTL's Human Resources Manager (*Id.*, ¶12). However, the problem was not corrected and Defendant McCracken became rude and retaliated in various ways (*Id.*, ¶ 13).

Plaintiff alleges that in order to escape the harassment she began working for MTL at home. In response, however, MTL "embarked on a campaign ... to discredit Plaintiff and scare her," filed criminal charges against her, and then discharged her. (*Id.*, ¶16). Plaintiff believes her employment was not "at will," but could only be terminated for just cause and with a right of appeal. (*Id.*, ¶ 18).

Based on these factual allegations, Plaintiff asserts in the Amended Complaint that she has a right of recovery under Title VII against MTL for sex discrimination (Count I), under Ohio Revised Code § 4112.99 against MTL for sex discrimination (Count II), under Ohio Revised Code § 4112.99 against Mr. McCracken for sex discrimination (Count III), under Ohio common law against MTL for breach of employment agreement (Count IV), under Ohio common law against MTL for promissory estoppel (Count V), for quid pro quo sexual harassment by James McCracken (Count VI), for hostile work environment sexual harassment by James McCracken (Count VII); for denial of tangible employment benefits and subjection to a hostile work environment (Count VIII), for retaliation for complaints of sexual harassment (Count IX), for acquiescence by MTL supervisors in Mr. McCracken's sexual harassment (Count X), for intentional infliction of emotional distress by all Defendants (Count XI), for punitive damages against all Defendants (Count XI), and for invasion of privacy by MTL and Defendant Fife (Count XIII). Plaintiff seeks reinstatement, back pay, compensatory damages of $6.75 million, punitive damages of $8.5 million, costs, attorney fees, and interest (Amended Complaint, Prayer, p. 18).

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ.P. 56. On a motion for summary judgment, the movant has the burden of showing that there exists no genuine issue of

material fact, and the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed. R. Civ. P. 50). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). If, after sufficient time for discovery, the opposing party is unable to demonstrate that he or she can do so under the *Liberty Lobby* criteria, summary judgment is appropriate. *Id.* The opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-50, 106 S. Ct. at 2510-11 (citations omitted).

"The mere possibility of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F. 2d 577, 582 (6th Cir.1992)(quoting *Gregg v. Allen-Bradley Co.*, 801 F. 2d 859, 863 (6th Cir. 1986) Therefore a court must make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than de minibus. *Herzl v. Keys,* 87 F. 3d 795 (6th Cir. 1996). "On summary judgment," moreover, "the inferences to be drawn from the underlying facts ... must be the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962). Thus, "the judges function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby,* 477 U.S. at 249, 106 S. Ct. at 2510.

> The moving party
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> > [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323; *see also, Boretti v. Wiscomb,* 930 F.2d 1150, 1156 (6th Cir. 1991) (citation omitted). If the moving party meets this burden, the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial. *Matsushita,* 475 U.S. at 587; *Martin v. Ohio Turnpike*

Comm'n.,968 F.2d 606, (6th Cir. *1992) cert. denied,* 506 U.S..1054, 113 S. Ct. 979, 122 L.Ed.2d 133 (1993).

In ruling on a motion for summary judgment (in other words, determining whether there is a genuine issue of material fact), "[a] district court is not ... obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied,* 494 U.S. 1091 (1990). Thus, in determining whether a genuine issue of material fact exists on a particular issue, a court is entitled to rely only upon those portions of the verified pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

The Court has subject matter jurisdiction over Plaintiff's Title VII claims by virtue of 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 2000e-5(f); jurisdiction over Plaintiff's state law claims is conferred by 28 U.S.C. § 1367, since they are all part of the same case or controversy with the Title VII claims.

On the state law claims, state substantive law provides the rules of decision. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 2d 1188 (1938). In applying state law, the Sixth Circuit follows the law of the State as announced by that State's supreme court. *Ray Industries, Inc. v. Liberty Mut. Ins. Co.,* 974 F. 2d 754, 758 (6th Cir. 1992); *Miles v. Kohli & Kaliher Assocs.,* 917 F. 2d 235, 241 (6th Cir. 1990). "Where the state supreme court has not spoken, our task is to discern, from all available sources, how that court would respond if confronted with the issue."

Id.; In re Akron-Cleveland AutoRentaL Inc., 921 F. 2d 659, 662 (6th Cir. 1990); *Bailey v. V & 0 Press Co.*, 770 F. 2d 601 (6th Cir. 1985); *Angelotta v. American Broadcasting Corp.*, 820 F. 2d 806 (1987). The available data to be considered if the highest court has not spoken include relevant dicta from the state supreme court, decisional law of appellate courts, restatements of law, law review commentaries, and the "majority rule" among other States. *Bailey*, 770 F. 2d at 604. Of course, federal procedural law governs regardless of the basis of jurisdiction. *Sibbach v. Wilson*, 312 U.S. 1, 61 S. Ct. 422, 85 L. Ed. 479 (1940).

The facts set forth in this Report are admitted or established by evidence competent under Fed. R. Civ. P. 56(e) and not controverted by opposing competent evidence.

SEX DISCRIMINATION CLAIMS AGAINST MTL

Counts I and II of the Amended Complaint plead claims for sexual discrimination, other than by way of sexual harassment, against MTL. While the Amended Complaint itself is conclusory on what acts constituted sex discrimination, Plaintiff makes her allegations clear in her Memorandum in Opposition to MTL's summary judgment motion (Doc. #264).

1. Plaintiff claims she was not given a six-month evaluation but that male employees were (Doc. #264, p. 47).

2. Plaintiff claims she was treated differently from a male employee by the name of Mark Skeens who allegedly stole a voltmeter and "pirated" software in that Skeens was merely terminated for his behavior whereas she was terminated,

criminally prosecuted, and had a memorandum about her thefts posted on the company bulletin board and circulated through the company mail system (Doc. #264, p. 47).

3. Plaintiff claims she was treated differently from male employees Bob Collins and Doug Dickerson who were allegedly permitted to work at home for pay by MTL, whereas Plaintiff claims she was working at home, but was fired for doing so (Doc. 3264, p. 49).

4. Plaintiff makes a generalized "disparate impact" claim based on the low overall percentage of female employees at MTL (Doc. #264, pp. 51.52).

Omission of six-month evaluation: With respect to the evaluation claim, Title VII requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated "in all respects," *Mitchell v. Toledo Hospital,* 964 F. 2d 577 (6th Cir. 1992). The only male employee with whom Plaintiff compares herself as to the six-month evaluation is Brett Sinks, but his six-month evaluation occurred many years before when MTL was s subsidiary of the Mead Corporation. The corporate spin-off obviously makes the two persons not similarly situated: they were not employed by the same corporate entity.

In addition, to be actionable under Title VII, an adverse employment action must be material. That is, it must result in a material adverse change in the terms of employment. *Kocsis v. Multi-Care Management, Inc.,* 97 F. 3d 876, 885 (6th Cir. 1996). Ms. Winters has offered no evidence that her situation would have somehow changed materially for the better if she had been given the evaluation.

Failure to prosecute Mr. Skeens: Ms. Winters is also not similarly situated to Mr. Skeens. While he was suspected of stealing a voltmeter, he never admitted doing so and there was no proof that he had sone so, merely a suspicion. The "pirated" software was not software belonging to MTL, but software of a third party, apparently inappropriately put on MTL's machines without appropriate licensing. At the time that Ms. Winters was terminated for theft of time and forgery and the reasons for her termination publicized, she had admitted those offenses to Beavercreek Detective Potts.

Failure to allow Ms. Winters to work at home: Plaintiff now claims that all the hours she was convicted of stealing from MTL she in fact worked at home, allegedly to avoid Mr. McCracken. She compares herself with two male employees, Bob Collins and Greg Dickerson, whom she says were allowed to work at home without being disciplined.

Ms. Winters' testimony that she worked at home all of the hours in question cannot be accepted by this Court, because it contradicts her plea of guilty to theft of those hours in the Greene County Common Pleas Court. After being confronted with her apparent forgeries of the signature of a Greene County Assistant Prosecutor and falsification of time cards at MTL, she confessed to those offenses to the police. Later, with the assistance of counsel, she appeared before Greene County Common Pleas Thomas Rose and pled guilty to two felony counts arising out of that behavior.

Where a court has scrupulously followed the required procedure under Criminal Rule 11, "the defendant is bound by [her] statements in response to that court's inquiry." *Baker v. United States*, 781 F. 2d 85, 90 (6th Cir.), *cert. denied,*

479 U.S. 1017 (1986), quoting *Moore v. Estelle,* 526 F. 2d 690 (5th Cir.), *cert. denied,* 426 U.S. 953 (1976). A guilty plea bars a defendant from raising in federal habeas corpus such claims as the defendant's right to trial and the right to test the state's case against him. *McMann v. Richardson,* 397 U.S. 759 (1970); *McCarthy v. United States,* 394 U.S. 459, 466 (1969); *a fortiori*, such claims cannot be raised in a completely collateral civil action. "[T]he representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations made in open court carry a strong presumption of verity." *Blackledge v. Allison,* 431 U.S. 63, 73-74, 97 S. Ct. 1621, 1629, 52 L. Ed. 136 (1977). A voluntary and intelligent plea of guilty made by an accused person who has been advised by competent counsel may not be collaterally attacked. *Mabry v. Johnson,* 467 U.S. 504, 104 S. Ct. 2543, 81 L. Ed. 2d 437 (1984). It is well settled that "a party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts his [or her] earlier deposition testimony. *Gagne v. Northwestern Nat. Ins. Co.,* 881 F. 2d 309, 315 (6th Cir. 1989), quoting *Reid v. Sears, Roebuck & Co.,* 790 F. 2d 453, 460 (6th Cir. 1986); *accord Biechele v. Cedar Point, Inc.,* 747 F. 2d 209, 215 (6th Cir. 1984) (quoting *Perma Research & Dev. Co. v. Singer Co.,* 410 F. 2d 572, 578 (2d Cir. 1969); *Radobenko v. Automated Equipment Corp.,* 520 F. 2d 540. (9th Cir. 1975); *Camfield Tires, Inc., v. Michelin Tire Corp.,* 719 F. 2d 1361 (8th Cir. 1983). *A fortiori*, a party cannot create a factual question by contradicting a guilty plea made in open court and under oath.

Disparate impact claim: Ms. Winters claims she somehow suffered from disparate impact discrimination because the work force at MTL is only approximately 20% female. Plaintiff argues that "The reasonable inference from these statistics is that the number of females employed at MTL is controlled and managed as opposed to MTL hiring the best candidate for a position, regardless of gender." (Doc. #264, p. 51). If such a policy exists at MTL (and no witness has identified such policy), it is difficult to see how it harmed Plaintiff, since she was in fact hired. More importantly, as Defendant points out, the raw statistic is meaningless in the absence of showing of labor force participation in the relevant categories. *Grano v. Dept. of Development of the City of Columbus*, 699 F. 2d 836, 837 (6th Cir. 1983).

Counts I and II of the Amended Complaint should be dismissed with prejudice.

SEXUAL HARASSMENT CLAIMS

Plaintiffs asserts sexual harassment claims against both MTL and Mr. McCracken in Counts III, VI, VII, VIII, and X. Plaintiff advances both quid pro quo and hostile work environment claims.[1]

The qui prod quo claim (Count VI) is that Mr. McCracken promised Ms. Winters that if she would

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[1] The Supreme Court has abolished this distinction for purposes of employer liability, but has retained it for the "threshold question whether a plaintiff can prove discrimination in violation of Title VII." *Burlington Industries, Inc., v. Ellerth,* 118 S. Ct. 2257, 2265 (1998).

"cooperate with him sexually," he would promote her to the position of his Special Assistant when he became head of the INTELLX Division of MTL. Plaintiff has testified that she refused to cooperate and it is admitted she was never promoted to that position. However, she cannot establish a quid pro quo claim of discrimination because neither the position nor the INTELLX Division itself was ever created. Thus, Plaintiff was not denied a tangible job benefit as the result of refusing to corporate sexually with Mr. McCracken. Hence there is no quid pro quo liability. *Kauffman v. Allied Signal, Inc.*, 970 F. 2d 178, 186 (6th Cir. 1992). Count VI should be dismissed with prejudice.

Ms. Winters' hostile work environment claims (Counts III, VII, VIII, and X) require much more extensive analysis. To establish such a claim as to a supervisor, a plaintiff must show that (1) she was a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) the harassment was based on her sex; and (4) the harassment created a hostile work environment. *Kauffman, supra,* as modified by *Williams v. General Motors Corp.*, 187 F. 3d 553, 560 (6th Cir. 1999). As to the fourth element, "[d]iscrimination in this form occurs '[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Williams*, 187 F. 3d at 560, quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). We are cautioned by the Sixth Circuit in *Williams* to apply a totality of the circumstances test to determine the extent and severity of the alleged harassment and not to disaggregate specific incidents of abuse. 187 F. 3d at 562. In making that determination, *Harris* requires that

both an objective and a subjective test be applied: the workplace must have been perceived as hostile or abusive by the victim and it must have been objectively hostile or abusive. In considering the objective prong, *Harris* suggests a district court should consider the frequency of the abusive conduct, its severity, whether it is physically threatening or merely an offensive utterance, and whether it unreasonably interferes with an employees work performance. 510 U.S. at 22.

In this case, Plaintiff complains of comments with sexual content which are said to be inappropriate for the workplace and which she alleges were offensive to her. These include sexual content jokes, discussions of Mr. McCracken's marital sex life and his stepdaughter's conduct with respect to menstruation, and double entendre remarks. Secondly, Plaintiff complains of invitations which she regarded as sexual, including two invitations to have dinner and one occasion when Mr. McCracken volunteered to come to her house and help her in response to her comment that she did not know how to put up a trellis or arbor that someone had given her. Thirdly, Plaintiff complains of Mr. McCracken complimenting her on her appearance. Lastly, Plaintiff complains of inappropriate touching on the neck, back, arms, and shoulders, repeated staring at her breasts and attempting to look up her skirt, and of one occasion on which Mr. McCracken allegedly squeezed Ms. Winters between himself and a computer table.

Given the totality of the circumstances test, the Court cannot say that all of this behavior, taken together, could not be found by a reasonable jury to constitute sexual harassment sufficiently pervasive to make the workplace abusive.

Defendant MTL claims the benefit of the affirmative defense to sexual harassment claims enunciated by the Supreme Court in *Burlington Industries, Inc., v. Ellerth,* 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton,* 118 S. Ct. 2275 (1998).

The defense is not available to an employer if the supervisor's harassment culminated in a tangible employment action such as discharge, demotion, or an undesirable reassignment. *Ellerth*, 118 S. Ct. at 2270; *Faragher,* 118 S. Ct. at 2293. No such tangible employment action occurred here. Ms. Winters continued to be employed by MTL until she was fired for stealing time from the company. While she claims that Mr. McCracken thereafter became rude to her, increased her workload, and failed to give her information needed for her work, none of these things, assuming they happened, amounts to a "tangible employment action."

To avail itself of the *Ellerth-Faragher* defense, an employer must show that it took reasonable care to prevent sexual harassment and to cure any incidents which happened. It is undisputed that MTL had a company policy against sexual harassment which was widely distributed to employees, certainly a reasonable means to prevent occurrences by advising employees of what is unacceptable conduct in the workplace.

With respect to cure, the first complaint Ms. Winters made of sexual harassment was she complained to John Ream, vice president of administration, on March 8, 1996, even though she had confided to co-workers as early as the fall of 1995 about her discomfort with Mr. McCracken's behavior. Mr. Ream told her that the appropriate person to

whom to complain was Sue App, the Human Resources manager, which is also what the employee manual says should be done. He himself conveyed the complaint to Ms. App immediately and Ms. App came to Ms. Winters about the problem the same day, before Ms. Winters has followed Mr. Ream's instruction to see Ms. App.

When Ms. Winters complained to Ms. App, she mentioned the sexual content comments mentioned above along with Mr. McCracken's offer to buy dinner and to come over to her house (App. Affidavit, ¶ 15). "At no point did Ms. Winters mention any physical touching or quid pro quo behavior on the part of McCracken" (*Id.*, ¶ 16). Ms. App. asked Plaintiff what she wanted done and she requested only that she be treated professionally and that Mr. McCracken not get personal with her. (*Id.*, ¶ 17). She did not ask for a transfer or for any discipline to be imposed on Mr. McCracken. Ms. App told Ms. Winters to contact her immediately if she had any more problems (*Id.*, ¶ 18). She then called Mr. McCracken into her office and asked him to respond to the allegations Ms. Winters had made. He responded that the matter of his stepdaughter's plumbing difficulties was a matter of general discussion in the office, that the comments about his marital problems had come in response to a question from Plaintiff about why his first marriage ended in divorce, that he had offered to buy dinner and bring it into the office on one occasion but not to take Plaintiff out for dinner, that his being in her office late in the evening was pursuant to a standard practice of checking which of his employees were working early or late, and that he could not recall ever having touched her (*Id.*, ¶ 20). Ms. App then instructed him to maintain physical distance from the Plaintiff, discuss business matters only, and refrain from

discussing any personal or sexual matters with her or in her presence (*Id.*, ¶ 22). Ms. App then visited Ms. Winters' work area and never saw McCracken in the vicinity. (*Id.*, ¶ 24).

Aside from trying to tell Ms. App in late March, 1996, about Mr. McCracken being rude to her and trying to move her desk into the hall after her complaints about him, Ms. Winters never made any other complaints to Sue App, particularly of any sexual harassment (*Id.*, ¶ 26 Karen Winters Depo., pp. 476-478). Ms. Winters never again complained to John Ream about Mr. McCracken (Ream Affidavit, ¶ 11).

Of course, what steps are reasonable to take to cure sexual harassment will depend in part on the seriousness of the complaint. What Ms. App heard from Ms. Winters was about sexual comments offensive to the Plaintiff, but not facially abusive language (Compare the sexually abusive language in *Williams v. General Motors, supra*, where the language in question is facially demeaning to women, *e.g.*, calling the plaintiff a "slut."). She also heard about invitations which carried in Ms. Winters' mind a sexual innuendo, invitations to dinner or to help with putting up a garden trellis. Ms. App did not hear about any alleged touching or quid pro quo conduct. In any event, the touching which Plaintiff alleges did occur and of which she complained to Mr. Ream and some other co-workers or subordinate may be sexual or it may not, as compared with intentional touching of "sexual" parts: breasts, thighs, buttocks, which is almost always sexual in its intention. (Compare to the Conduct in *EEOC v. Wilson Casket*, 24 F. 3d 836 (6th Cir. 1994).

Under the circumstances, what Ms. App did was eminently reasonable. She immediately confronted the alleged harasser, advised him that any conduct in which he had engaged was being perceived by his subordinate as sexual harassment and must stop, visited the work site to see if there was any evidence of a problem, and waited to see if the victim had any further complaints.

Because MTL took reasonable steps to prevent sexual harassment and to cure what it was told had happened, it is not liable for sexual harassment of Ms. Winters by Mr. McCracken. As to MTL, Counts III, VII, VIII, and X should be dismissed with prejudice.

To the extent Counts III and VII purport to state claims for sexual harassment against Mr. McCracken as opposed to MTL, they are not actionable under Title VII. An individual may not be held liable for damages under Title VII unless he or she is an employer within the meaning of the statute. *Wathen v. General Electric Co.,* 115 F. 3d 400, 406, (6th Cir. 1997). However, an individual supervisor/manager may be held jointly and severally liable with the employer for discriminatory conduct in violation of Ohio Revised Code Ch. 4112. *Genaro v. Central Transport, Inc.,* 84 Ohio St. 3d 293, 703 N.E. 2d 782 (1999). This Court's subject matter jurisdiction over those claims is supplemental under 28 U.S.C. § 1367. Because all federal claims herein should be dismissed with prejudice, the state law claims against Mr. McCracken should be dismissed without prejudice for refiling in state court. 28 U.S.C. § 1367 (d).

BREACH OF EMPLOYMENT CONTRACT CLAIM

Plaintiff claims that she had an employment contract with MTL under which she was entitled to be employed until retirement at age 65 and terminated only for just cause. She has not produced and has admitted she cannot produce any written evidence of such a contract.

In Ohio, in the absence of statutory or public policy limitations or an employment contract which specifically limits the grounds for terminaion, employment is "at-will". *Mers v. Dispatch Printing Co.,* 19 Ohio St.3d 1,483 N.E. 2d 150 (1985). Where a contract does not specify a particular term or duration, there is a strong presumption of employment at-will unless the contract or other circumstances clearly manifest the parties' intent to the contrary. *Mers, supra*. In the absence of facts and circumstances which will indicate that an agreement is for a specific term, an employment contract is terminable at-will by either party. *Henkle v. Education Research Council,* 45 Ohio St. 2d 249,344 N.E. 2d 118 (1976).

Although employee handbooks are not in and of themselves a contract of employment, they are nevertheless evidence of the terms of the employment contract. *Kelly v. Georgia-Pacific Corp.,* 46 Ohio St.3d 134, 545 N.E. 2d 1244 139 (1989). An employee handbook or personnel manual does not create a guaranteed contract right unless the language manifests contractual intent on the employer's part or states that the policy included therein is guaranteed. *Wilmer v. Tennessee Eastman Co.,* 919 F.2d 1160 (6th Cir. 1990). A disclaimer that an employee handbook or personnel manual is not intended to create a contract negates any inference that

they do, even if signed under threat of termination. *See, Gaumont v. Emery Air Freight Corp.*, 61 Ohio App. 3d 277, 572 N.E. 2d 747 (Montgomery Cty. 1989).

MTL's employee handbook which Ms. Winters received plainly states that the employment relationship is at will on both sides. Any possible inference she may have drawn from anything Mr. McCracken said to her in the employment interview is contradicted by the express language in the handbook which advises employees that no supervisor has the authority to vary the terms of employment.

Plaintiff's disingenuous refusal to acknowledge her signature on the employment application does not bar summary judgment. Defendants have produced the affidavit of handwriting expert Robert Massie to show that it is her signature and there is no competing evidence. In any event, the key question is not whether she remembers signing, but whether in fact she signed.

Even if Plaintiff were correct and she had a contract which could be terminated only for just cause, the Court finds as a matter of law that an employer has just cause to terminate an employee who admits to the police that she has falsified time cards to her employer and forged a public document to corroborate the falsification. In this case the cause is even stronger, since Plaintiff eventually pleaded guilty to two felony offenses involved in the falsification and forgery.

Given this analysis, the Court need not reach Defendants' statute of frauds argument. Count IV of the Amended Complaint should be dismissed with prejudice.

PROMISSORY ESTOPPEL CLAIM

In Count V, Plaintiff claims that she "reasonably and justifiably relied on written and oral representations of continuing future employment" with MTL. In fact, Plaintiff presents no written representations at this stage of the case, relying instead on the same alleged oral representations from Mr. McCracken which she relies on for her breach of contract claim.

A showing of detrimental reliance by an employee based on specific promises made by the employer may give rise to an exception to the employment-at-will doctrine. *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St. 3d 131,543 N.E. 2d 1212 (1989). The test is whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee. *Mers v. Dispatch Printing Co.*, 19 Ohio St. 3d 100, 483 N.E. 2d 150 (1985). The employer's promises must have included a specific promise of continued employment. *Wing v. Anchor Media Ltd.*, 59 Ohio St.3d 108 (1991); *Helmick, supra.*

Plaintiff has not proven any detrimental reliance. She did not give up another job to go work at MTL, but merely ceased other job prospects.[2] She has offered no proof that doing so was somehow detrimental to her.

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[2] According to her job application at MTL, she had been unemployed since May, 1995.

Much more importantly, even if Plaintiff has established a promise sufficient to take her case outside the employee handbook, she has failed to show or even hypothesize a promise which would be actionable in this case. She does not claim that Mr. McCracken offered her employment to age 65 even if she fail to come to work and falsified her time cards, forging a public document to corroborate the theft. But that is what happened here. Promissory estoppel creates a contractual relationship, subject to the same sorts of defenses as the express contract theory would be.

Count V should be dismissed with prejudice.

RETALIATION CLAIM

In Count IX, Plaintiff claims MTL retaliated against her for complaining of Mr. McCracken's sexual harassment.

A retaliation claim is analogous to an intentional discrimination or disparate treatment case and is subject to the same sequence and burden of proof. *Zanders v. National R. R. Passenger Corp.*, 898 F. 2d 1127, 1134 (6th Cir. 1990). Plaintiff must first establish a prima facie case by a preponderance of the evidence. The elements of prima facie retaliation claim are:

> (1) that plaintiff engaged in activity protected by Title VII;
> (2) that the exercise of [plaintiff's] civil rights was known to the defendant;
> (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and

> (4) that there was a casual connection between the protected activity and the adverse employment action.

Christopher v. Stouder Memorial Hospital, 936 F.2d 870 (6th. Cir. 1991), *cert. denied,* 502 U.S. 1013, 112 S.Ct. 658 (1991), *citing, Wrenn v. Gould,* 808 F. 2d 493, 500 (6th Cir. 1987), *Canitia v. Yellow Freight System, Inc.,* 903 F. 2d 1064, 1066 (6th Cir.), *cert. denied,* 498 U.S. 984 (1990); *Anders,* 898 F. 2d at 1135; *Cooper v. City of North Olmsted,* 795 F. 2d 1265 (6th Cir. 1986); *Jackson v. RKO Bottlers of Toledo, Inc.,* 743 FI 2d 370, 375 (6th Cir. 1984). If plaintiff establishes a prima facie case by a preponderance of the evidence, the burden shifts to the defendant to articulate a legitimate, non-retaliatory, reason for its action. *Anders,* 898 F. 2d at 1135. If the employer meets this burden, the employee bears the ultimate burden of persuading the court that the employer's reason is pretextual. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S. Ct. 1089,67 L. Ed. 2d 207 (1981). If a legitimate nonretaliatory reason for the adverse action is articulated by the employer, the presumption of discrimination which flows from the prima facie case is eliminated. *Weems v. Ball Metal & Chemical Division, Inc.,* 753 F. 2d 527, 529, n.2 (6th Cir. 1985). The burden of persuasion remains at all times on the plaintiff. *Burdine, supra.*

In her Memorandum in Opposition to the Motions for Summary Judgment, Ms. Winters relies on two sets of facts in support of her retaliation claim. The first set of acts of retaliation are those of Mr. McCracken himself after she made her complaint to Mr. Ream and Ms. App. These consist of his being rude and his attempt to move her desk into the

hall. Neither of these constitutes a tangible employment action as required under Title VII; in fact, the attempted desk move was thwarted.

The second set of facts relied on is the termination. To prove this theory, Plaintiff constructs an elaborate tissue of inferences to attempt to prove that MTL CEO Defendant Fife knew as early as April, 1996, that Ms. Winters was falsifying her time cards, but did nothing about it until August, 1996, to "give her enough rope to hang herself." This entire tissue of inferences relies on a completely unreliable statement by Herbert Hirsch as to whether he complained to Mr. Fife about Ms. Winters' continual absences. Mr. Hirsch was badgered by Plaintiff's counsel into making what Mr. Hirsch characterized as a guess or speculation that it was somewhere in the April-June time frame. In contrast, Defendants have presented the unequivocal testimony of Mr. Fife that he learned of Ms. Winters' continued absence from Ms. App in mid-August, 1996, when she asked him to call the Greene County Common Pleas Court to obtain an excuse of Ms. Winters from further jury duty. Having called with that purpose, Mr. Fife was then advised by Assistant County Prosecutor David Mesaros that Ms. Winters has not served on the grand jury since April, 1996. Mr. Mesaros determined that the excuses which Ms. Winters had given to MTL, which purportedly came from the Greene County Prosecutor, were forgeries. Upon investigation by the Beavercreek Police, Ms. Winters admitted lying about her grand jury service. Having learned of the lies, MTL terminated her. No reasonable jury could find that Ms. Winters' post-confession termination in August was in retaliation for her having complained of sexual harassment in March. Count IX should be dismissed with prejudice.

INFLICTION OF EMOTIONAL DISTRESS CLAIM

In Count XI, Plaintiff seeks damages for intentional and/or negligent infliction of emotional distress.

Recovery for the independent tort of negligent infliction of emotional distress is limited to such instances as where one was a bystander to an accident or was in fear of physical consequences to his own person and where a plaintiffs claim does not arise out of such circumstances, the plaintiff fails to state a claim for negligent infliction of emotional distress. *Bunger v. Lawson Co.* 82 Ohio St. 3d 463, 696 N.E. 2d 1029 (1998); *High v. Howard,* 64 Ohio St.3d 82, 592 N.E. 2d 818 (1992), *overruled on other grounds, Gallimore v. Children's Hospital Medical Center,* 67 Ohio St.3d 244(1993); *Strawser v. Wright,* 80 Ohio App, 3d 751, 610 N.E. 2cl 610 (Preble Cty. 1992). While the Ohio Supreme Court has not spoken directly on the issue as yet, the Ohio Courts of Appeal have refused ~~to~~ recognize a cause of action for negligent infliction of emotional distress arising in an employment situation. *Hatlestad v. Consol. Rail Corp.,* 75 Ohio App. 3d 184, 598 N.E. 2d 1302 (1991); *Tohline v. Central Trust Co.,* N.A., 48 Ohio App. 3d 280, 549 N.E. 2d 1223 (1988); *Tschantz v. Ferguson,* 97 Ohio App. 3d 693,647 N.E. 2d 507 (1994); *Hanly v. Riverside Methodist Hosp.,* 78 Ohio App. 3d 73 (1991); *Antalis v. Ohio Dept. of Commerce,* 68 Ohio App.3d 650, 589 N.E.2d 429 (Franklin Cty. 1990). "Without a clear expression of intent from the Ohio Supreme Court to broaden the current application of [negligent infliction of emotional distress] to include actions arising out of an employment setting" the federal courts should not recognize such a claim. *Penn v. Rockwell International Corp.,* 48 Fair Empl. Prac. Cas. (BNA) 624, 631 (S.D. Ohio

1994) (Holschuh), but *see Crihfield v. Monsanto Co.*, 844 F. Supp. 371 (S.D. Ohio 1994)(Spiegel)(recognizing tort in sexual harassment in employment case). Judge Spiegel's decision, relied upon by Plaintiff, has now been expressly rejected by the Sixth Circuit, *Pearsall v. Chrysler Corp.*, 1996 US App LEXIS 2794 (1996).

In recognizing the tort of intentional infliction of emotional distress in Ohio, the Ohio Supreme Court adopted Restatement of the Law 2d, Torts 2d, §46, and comment d to that section which reads:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and

> in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely "inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. *See* Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harvard Law Review 1033, 1053 (1936).

Yeager v. Local Union 20, 6 Ohio St. 3d 369,453 N.E. 2d 666, (1983).

In order to recover on an action for the intentional infliction of serious emotional distress four elements must be proved: 1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; 2) that the actor's conduct was so extreme and outrageous, that it went beyond all possible bounds of decency and that it can be considered utterly intolerable in a civilized community; 3) that the actor's actions were the proximate cause of the plaintiff's psychic injury; and 4) that the mental anguish suffered by the plaintiff is serious and of nature that no reasonable person can be expected to endure it. *Miller v. Currie*, 50 F. 3d 373 (6th Cir. 1995); *Pyle v. Pyle*, 11 Ohio App. 3d 31, 34, 463 N.E.2d 98, 103 (Cuyahoga Cty. 1983)

(citation omitted); *Bellios v. Victor Balata Belting Co.*, 724 F. Supp. 514, 520 (S.D. Ohio 1989).

The emotional distress suffered by Plaintiff since her termination at MTL, whatever it's cause[3], is not severe enough to be actionable under Ohio law. *Gagne v. Northwestern Nat. Ins. Co.*, 881 F. 2d 309, 315 (6th Cir. 1989). Plaintiff has received no treatment for her distress from any medical or psychological personnel.

Count XI of the Amended Complaint should be dismissed with prejudice.

PUNITIVE DAMAGES CLAIM

For whatever reason, Plaintiff has attempted to plead her claim for punitive damages as a separate cause of action in Count XII. There is no such cause of action separate from the underlying causes of action on which punitive damages may be based.

Based on the analysis set forth above, Plaintiff may have a triable claim for punitive damages against Mr. McCracken on her claim for sexual harassment under Ohio Revised Code § 4112.99 which can be addressed by the state courts on refiling. Because all the other claims should be dismissed with prejudice, further analysis of the claim for punitive damages is unnecessary.

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[3] Defendants point out that Plaintiff has offered no evidence to separate whatever emotional distress she has felt as a result of the termination from whatever emotional distress she may be feeling from having been convicted of two felonies.

INVASION OF PRIVACY CLAIM

In Count XIII, Plaintiff seeks compensatory and punitive damages against MTL and against Arnold Fife individually for invasion of her privacy:

(1) by posting on the MTL bulletin board on August 26, 1996, a notice that Plaintiff was being questioned by Beavercreek detectives about her time allegedly spent on grand jury duty over the prior five months (Amended Complaint, Doc. #126, ¶74), and

(2) by posting on the MTL bulletin board and placing in employee mailboxes on September 3, 1996, a notice that Plaintiff had been terminated for falsification of time cards (*Id.*, ¶75).

Plaintiff further alleges that the "facts disclosed were private matters which the Plaintiffwas entitled to keep private. Plaintiff at no time was a Voluntary or involuntary public figure and she has always sought to maintain her privacy. No legitimate public concern was served by disclosure of these matters." (*Id.*, ¶77).

The first part of Plaintiff's privacy argument is truly astounding:

> Defendant Fife and App knew the police were coming that day to the Defendant MTL headquarters to take Karen away because Detective Potts notified Defendant Fife in advance of their coming. . . Defendant Fife did nothing to stop them.

> Instead of suggesting to the police that arrangements be made to contact Karen privately and then have her meet the detectives at the police station so that the matter could be handled privately without embarrassment to Karen and without disruption of any staff observing two police officers walking into company headquarters and hauling off an employee could cause.
>
> Karen was ambushed!.

(Doc. #264, p. 88). The argument suggests that the victim of a crime has a duty to minimize the criminal's embarrassment resulting from being caught and confronted by the police. No such duty exists and it is hard to imagine a cogent argument for creating one.

Having complained that her initial confrontation with police was public rather than private, Ms. Winters then proceeds to claim damages for the company's explanation of the confrontation and its later announcement of her indictment and termination.

The parties' motion papers in discussing the invasion of privacy claim largely focus on Defendants' claim of privilege in making the announcements, but the Magistrate Judge believes the flaw in this claim lies in Plaintiff's prima facie case.

In recognizing the tort of invasion of privacy, the Ohio Supreme Court adopted Restatement of Torts 2d § 652 (A) as follows:

> (1) One who invades the right of privacy of another subject to liability for the resulting harm to the interests of the other.
>
> (2) The fight of privacy is invaded by:
> (a) unreasonable intrusion upon the seclusion of another [as stated in § 652B; or]
> (b) appropriationof the other's name or likeness [as stated in § 652C; or]
> (c) unreasonable publicity given to the other's private life [as stated in § 652D; or]
> (d) publicity that unreasonably places the other in a false light before the public [as stated in §652E.]

Jackson v. Playboy Enterprises, Inc., 574 F. Supp. 10, 12 (S.D. Ohio 1983), quoting *Justin v. Fee,* 69 Ohio St. 2d 143, 145, 431 N.E. 2d 992, 993 (1982). *See also Housh v. Peth,* 165 Ohio St. 35, 133 N.E. 2d 340 (1956); *Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St. 2d 224, 351 N.E. 2d 454 (1976), rev'd on other grounds, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977).

§ 652D of the Restatement Second provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is of a kind that
> (a) would be highly offensive to a reasonable person, and
> (b) is not of legitimate concern to the public.

However, comment b to that section states "[there is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." As quoted in *Jackson,* 574 F. Supp. at 13.

These principles, taken together, demonstrate the flaws in Plaintiff's prima facie privacy claim. The fact that Plaintiff had been confronted by the police was known to many at MTL because it had taken place in front of them; even though Plaintiff claims it should have been done in private, it was not. The fact that the Plaintiff was being questioned by the Beavercreek Police about her time records was not private or confidential to the Plaintiff: It was known to the police and it was known to at least Mr. Fife an Ms. App and they did not learn it by intruding somehow on Ms. Winters' seclusion– they learned it from the police. The fact of Ms. Winters' indictment was not private – it was the public act of the Greene County Grand Jury. Ms. Winters claims that statement that she had been terminated for falsifying her time cards is an invasion of her privacy because it was not true because she hadn't been told she was terminated. Surely, then, it was not information which was private to her.

Claims of entitlement to privacy should be analyzed from both an objective and subjective perspective. That is, does the person have an actual expectation of privacy in the information and is it a reasonable or legitimate expectation, one which society is prepared to honor. *See Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L. Ed. 2d 576 (1967)(concurring opinion of Justice Harlan). The notion that one has a right to have one's dealings with the police conducted and maintained in private is a dangerous one.

Undoubtedly, being arrested[4], accused of crime, indicted, convicted, and sentenced are all embarrassing to the criminal defendant, but to allow the police to conduct these proceedings in private for fear of that embarrassment would be contrary to the whole tenor of the Fourth and Fourteenth Amendments which at least implicitly expose all police conduct to public scrutiny. For that reason the Constitution does not countenance "private" arrests, but requires that the arrested be brought without undue delay before a judicial officer and that probable cause be shown for any detention. *Gerstein v. Pugh,* 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). Of course, once a matter is in court, virtually nothing about it can be shielded from public scrutiny. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed; 2d 629 (1984); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *State, ex rel. Beacon Journal Publishing Co., v. Donaldson,* 63 Ohio St. 3d 173 (1992)(Douglas concurring would hold that "a courtroom should never be closed.").

Because Plaintiff has shown no legitimate expectation that the facts surrounding her confrontation with the police and her termination for falsifying her time records should be private, and because many of the publicized facts were already public, within the meaning of the law, her prima facie case for invasion of privacy fails.

---

[4] Apparently, Plaintiff was never actually placed under arrest, but she could have been as the police had probable cause to believe she had committed one or more felonies when they came to MTL to speak to her.

In addition, Defendants' claim of privilege is well taken. An employer should be free to explain to employees why a co-worker has been taken from the premises by the police, to advise those employees not to discuss the matter with the co-worker, and eventually advise them that she has been indicted and terminated for her theft. If an employer were required to be silent about such facts, the deterrent effect of a conviction for theft of company time or other property would belargely lost.

Plaintiff's invasion of privacy claim should be dismissed with prejudice.

CONCLUSION

All claims made in the Amended Complaint against Defendants MTL and Fife should be dismissed with prejudice, as should all claims against Defendant McCracken except the state law claims of sexual harassment, which should be dismissed without prejudice under 28 U.S.C. § 1367(d).

December 6, 1999. /s/ _____
Michael R. Merz
United States Magistrate Judge

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Cir. P. 6(e), this period is automatically extended to

thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by mail and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may forfeit fights on appeal. *See, United States v. Waiters,* 638 F. 2d 947 (6th Cir. 1981); *Thomas v. Arn,* 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

Because of the age of this case, extensions of time to object or to respond to objections will be granted only upon an extraordinary showing of good cause. Because of the prolixity of the initial motion papers, the Court will not permit the parties to exceed twenty pages in their objections or responses thereto.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

No. C-3-97-454

[Filed September 20, 2000]

KAREN WINTERS, Plaintiff(s)	)
v.	)
MTL SYSTEMS, INC., et al, Defendant(s)	)

District Judge Susan J. Dlott

ORDER

This matter is before the Court pursuant to the Order of General Reference in the United States District Court for the Southem District of Ohio Western Division to the United States Magistrate Judge. Pursuant to such reference, the Magistrate Judge reviewed the pleadings and filed with this Court various decisions, orders and Reports and Recommendations.

The pending matters for consideration by this Court are as follows:

(1) Plaintiff's objections (Doc. 281) to the Magistrate Judge's notation order granting Defendants an extension of time on August 19, 1999 (Doc. 273);

(2) Plaintiff's objections (Doc. 299) to the Magistrate Judge's October 12, 1999 notation orders denying Plaintiff's motion to strike the affidavit attached to Defendants' summary judgment motion and granting Defendants leave to substitute exhibits;

(3) Plaintiff's objections (Doc. 300) to the Magistrate Judge's order allowing Defendants to designate Michael Virgin and Terry Mazur as witnesses (Doc. 293);

(4) Plaintiff's objections (Doc. 303) to the Magistrate Judge's October 12, 1999 order granting Defendants' motion to strike affidavit of Marguarite Flohre;

(5) Plaintiffs objections (Doc. 304) to the Magistrate Judge's Report and Recommendations that her motion for summary judgment should be denied (Doc. 295);

(6) Plaintiffs objections (Doc. 305) to the Magistrate Judge's order granting in part and

denying in part Defendants' motion to strike affidavits filed in support of Plaintiff's motion for summary Judgment (Doc. 294);

(7) Plaintiff's objections (Doc. 306) to the Magistrate Judge's notation order of October 18, 1999, denying Plaintiffs motion to strike the second supplemental affidavit of Marguarite Flohre (Doc. 290);

(8) Plaintiff s objections (Doc. 309) to the Magistrate Judge's notation order of October 28, 1999, denying Plaintiffs motion to stay the effect of the October 12, 1999 order allowing the identification of Michael Virgin and Terry Mazur as witnesses pending appeal to the District Judge;

(9) Plaintiff s objections (Doc. 313) to the Magistrate Judge's October 28, 1999 decision and order denying Plaintiffs motion for leave to file Plaintiffs motion to strike affidavits filed by Defendants in support of their motion for summary judgment (Doc. 302);

(10) Plaintiffs objections (Doc. 325) to the Magistrate Judge's Report and Recommendations recommending that Defendants' motions for summary judgment be granted except as to the state law claim of sexual harassment against Defendant James McCracken (which is recommended to be

dismissed without prejudice under 28 U.S.C. § 1367) (Doc. 320);

(11) Plaintiffs objections (Doc. 327) to the Magistrate Judge's December 10, 1999 decision and order denying Plaintiffs motion for sanctions (Doc. 324); and

(12) Plaintiff's objections (Docs. 330 and 334) to the Magistrate Judge's supplemental decision and order denying Plaintiff's motion for sanctions (Doc. 328).

For nondispositive matters, a district judge shall set aside any portion of a magistrate judge's order found to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a). "A finding is clearly erroneous where it is against the clear weight of the evidence or where the court is of the definite and firm conviction that a mistake has been made." *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 281 (6th Cir. 1991).

For dispositive motions, a district judge shall make a de novo determination upon the record of any portion of the magistrate judge's disposition to which specific written objection has been made. Fed R. Cir. P. 72(b).

The Court has reviewed the decisions of the Magistrate Judge and considered all of the filings in this matter. Upon consideration of the foregoing, the Court hereby OVERRULES each of the objections. The Court has also reviewed the comprehensive findings of the Magistrate Judge and considered de novo all of the filings in this matter. Upon

consideration of the foregoing, the Court does determine that such Recommendations should be adopted.

Accordingly, all claims made in the amended complaint against Defendants MTL and Fife are hereby DISMISSED WITH PREJUDICE, as well as all claims against Defendant McCracken except the state law claims of sexual harassment, which is hereby DISMISSED WITHOUT PREJUDICE under 28 U.S.C. § 1367(d).

IT IS SO ORDERED.

/s/ _____
Susan J. Dlott
United States District Judge

Supreme Court U.S.
FILED
JAN 23 2003
OFFICE OF THE CLERK

No. 02-851

IN THE

Supreme Court of the United States

KAREN L. WINTERS,

Petitioner,

v.

MTL SYSTEMS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MTL SYSTEMS, INC. AND ARNOLD FIFE

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QUESTIONS PRESENTED

1. Whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), the existence of an anti-harassment policy with complaint procedures and an employer's adequate response to a supervisor's alleged harassment insulate the employer from liability for a hostile environment when the employee's failure to promptly report the alleged harassment was unreasonable and permitted the harassment to become severe or pervasive?

2. Whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), an employer is precluded from asserting an affirmative defense when an employee unreasonably fails to take advantage of preventive or corrective opportunities provided by the employer by failing to report the alleged harassment over an extended time period so as to permit it to become severe or pervasive with no explanation for this failure?

STATEMENT PURSUANT TO RULE 29.6

Respondent MTL Systems, Inc. is a publicly traded corporation. There is no parent or publicly held company owning ten percent (10%) or more of the corporation's stock.

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STATEMENT OF THE CASE

Petitioner Karen Winters ("Petitioner" or "Winters") began working for Respondent MTL Systems, Inc. ("MTL") as a member of its clerical support staff on September 27, 1995. Respondent James McCracken ("McCracken") was her supervisor throughout her employment with MTL.

Immediately prior to March 8, 1996, Winters received a summons from the Greene County, Ohio Common Pleas Court for grand jury service. On March 8, 1996, just days before she was to begin jury service, Winters approached John Ream, MTL's Vice President of Administration, and told him that McCracken had made unwelcome advances to her and that she was uncomfortable around him. Ream advised Winters that she should contact Sue App, MTL's Manager of Human Resources.

After Winters left Ream's office, Ream immediately called App and reported his conversation with Winters. App called Winters that same day and met with her to discuss the problems that Winters claimed she was having with McCracken. Winters admitted that McCracken's inappropriate behavior had begun shortly after she began working at MTL in 1995.

Although Petitioner claims that "it is equally clear that Winters did not unreasonably delay or fail to take advantage of any preventive or corrective opportunities provided by MTL Systems, Inc. or fail to take appropriate action to avoid harm otherwise," her delay in reporting the alleged harassment suggests otherwise. As noted above, Winters admitted that the harassment began shortly after her employment at MTL commenced in Fall 1995, but she failed to report the harassment until March 1996.

Upon receiving Winters' complaint, App assured Winters that she would investigate the matter and that, if Winters had any further problems, she should contact App immediately. App then immediately contacted McCracken and asked him to respond to Winters' accusations. Although McCracken denied the allegations, App nevertheless instructed him to avoid being alone with Winters, to maintain physical distance, and to discuss only business matters with Winters. Both App and Ream informed Respondent Arnold Fife, MTL's President and CEO, about Winters' complaint.

For the next several weeks, App and Ream visited Winters' work area to assure themselves that the matter had been resolved. App and Fife also interviewed several employees who worked near Winters, and no one confirmed Winters' accusations. In addition, Fife met with McCracken and issued the same kinds of conditions to him as had App. Winters never complained of inappropriate comments or behavior by McCracken to anyone in MTL management after her conversations with Ream and App on March 8, 1996.

Winters continued to work at MTL. During this time, she claimed to be serving on the grand jury for the Greene County, Ohio Common Pleas Court. During this five-month period, Winters reported over 200 hours of grand jury service on her MTL employee time cards which she had not performed. She also presented MTL with purported official documentation verifying her grand jury service which she had, in fact, forged. Upon the Greene County Prosecutor's discovery of her scheme, Winters was arrested and indicted on two felony charges to which she pled guilty.

Winters was terminated after she confessed her crimes to the police and was indicted. She later sued MTL, McCracken and Fife, alleging numerous claims arising out of the employment relationship. The only one at issue here is Winters' claim against MTL for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

After exhaustive discovery, all parties filed cross-motions for summary judgment. The Magistrate Judge sustained MTL and Fife's motion for summary judgment as to all claims alleged in Winters' complaint. The District Court adopted the Magistrate Judge's report and recommendation in its entirety. The District Court sustained MTL's motion for summary judgment with regard to Winters' claim for sexual harassment under Title VII because it found that no tangible employment action was taken against Winters due to the alleged harassment. The District Court further found that MTL could avail itself of the affirmative defense enunciated by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998) because MTL took "reasonable steps to prevent sexual harassment and to cure what it was told had happened."

Upon Winters' appeal to the Sixth Circuit Court of Appeals, the Court affirmed the District Court's findings adopting the Magistrate Judge's "well-reasoned report and recommendation."

The case is now before this Court upon Petitioner's challenge to the lower courts' application of the affirmative defense, and specifically the lower courts' application of the second prong of the affirmative defense.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Court of Appeals Properly Applied the Employer's Affirmative Defense Established By This Court in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* in Accordance with Both Congress' Purpose in Enacting Title VII and the Principles Enunciated By This Court in Formulating the Defense.

A. The Sixth Circuit Court of Appeals Properly Applied the Affirmative Defense to the Facts of This Case.

In 1986, this Court addressed the issue of employer vicarious liability for sexual harassment in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986), and held that agency principles imposed constraints on an employer's vicarious liability. However, that decision did not resolve the exact parameters of employer vicarious liability for workplace sexual harassment. In 1998, this Court addressed the specific issue of employer vicarious liability where a supervisor creates a hostile work environment through sexual harassment in the companion cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998).

In *Ellerth* and *Faragher*, this Court stated:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over

> the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270; *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2292-93.

Here, the Petitioner's Title VII sexual harassment claim is based upon her supervisor's alleged creation of a hostile work environment. Petitioner does not dispute that no tangible employment action was taken against her. MTL was therefore entitled to assert the affirmative defense to liability set forth by this Court:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270; *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293.

The District Court and the Sixth Circuit properly determined that MTL was entitled to summary judgment based upon its assertion of this affirmative defense. The lower courts found that MTL had exercised reasonable care to prevent and correct promptly sexually harassing behavior in response to Winters' March 8, 1996 allegations. MTL had a company policy against sexual harassment in place prior to and during the period of the alleged harassment. This policy was widely distributed to and well known by its employees.

The District Court found, and the Sixth Circuit affirmed, that this was certainly a reasonable means to prevent occurrences of sexual harassment.

The District Court also noted that the Petitioner alleged that the harassing behavior began shortly after her employment with MTL commenced on September 27, 1995. However, she failed to make any complaint to MTL until March 8, 1996, and even then complained only of sexual content comments and her supervisor's offer to buy dinner and to visit her home. She did not complain of any physical contact or quid pro quo behavior on the part of her supervisor. Although the District Court did not expressly make a specific finding with regard to the second prong of the affirmative defense, its consideration of that prong was inherent in its decision.

In considering the Petitioner's allegations about her supervisor's behavior, the District Court found that MTL "immediately confronted the alleged harasser, advised him that any conduct in which he had engaged was being perceived by his subordinate as sexual harassment and must stop, visited the work site to see if there was any evidence of the problem, and waited to see if the victim had any further complaints." The District Court and Sixth Circuit properly found that MTL's prompt response was "eminently reasonable" under the circumstances.

The lower courts' findings demonstrate that MTL satisfied both prongs of the *Ellerth/Faragher* affirmative defense, and was entitled to summary judgment on the Petitioner's Title VII claim.

B. The Sixth Circuit Court of Appeal's Decision is Consistent with Both Congress' Purpose in Enacting Title VII and the Principles Enunciated By This Court in Formulating the Defense.

The Petitioner argues that the District Court and the Sixth Circuit improperly allowed MTL to prevail on the *Ellerth/ Faragher* affirmative defense because neither court properly analyzed the second prong of the affirmative defense. However, Petitioner's interpretation is erroneous and based upon an inappropriately narrow reading of *Ellerth* and *Faragher*. Most critically, the facts of those cases differ substantially from those present here.

Ellerth involved an employee who failed to inform anyone in authority about her supervisor's harassing behavior despite knowing that the employer had a sexual harassment policy. *Ellerth*, 524 U.S. at 748, 118 S. Ct. at 2262. *Faragher* involved an employee who failed to report sexual harassment to higher authorities, and an employer who also failed to disseminate its sexual harassment policy to the department where the alleged harassers and victims were employed. *Faragher*, 524 U.S. at 781-82, 118 S. Ct. at 2280-81. This Court accordingly did not address application of the defense in circumstances involving facts, such as those present here, where the employer acted reasonably to prevent and promptly correct harassing behavior after a delayed report of harassment by the employee.

However, this Court's reasoning in *Ellerth* and *Faragher* support application of the defense under these circumstances. This Court found that Title VII's deterrent purpose supports limited employer vicarious liability when effective grievance mechanisms exist and employees are encouraged to report

harassing conduct before it becomes severe or pervasive. *Ellerth*, 524 U.S. at 764, 118 S. Ct. at 2270. This Court accordingly found that the employer has an affirmative defense when an actionable hostile environment exists, when the employer shows that it acted reasonably to prevent or correct promptly any sexually harassing behavior and the employee did not act reasonably to avoid harm. *Id.* at 764-65, 118 S. Ct. at 2270. That is, the employee must "report harassing conduct before it becomes severe or pervasive" and thus attempt to avoid the harm. *Id.* at 764, 118 S. Ct. at 2270.

In sum, this Court recognized that "Title VII borrows from tort law the avoidable consequences doctrine" and thus it limited employer vicarious liability for harm to that which the employee could not avoid. *See id.* As this affirmative defense only comes into play in a case where an actionable hostile environment exists because the harassment is severe or pervasive, the affirmative defense limits the employer's vicarious liability when the employee could have prevented the environment from becoming actionable and the employer acted reasonably in preventing or correcting alleged harassment.

As noted by a Texas district court, the parameters of the defense, especially the second prong, are best understood by looking to this Court's rationale in adopting the affirmative defense. *See Mirakhorli v. DFW Management Co.*, No. 3:94-CV-1464-D, 1999 U.S. Dist. LEXIS 9344, at *23 (N.D. Tex. May 24, 1999). The policies cited by this Court in formulating the employer's affirmative defense, as well as Congress' purpose in enacting Title VII, must guide the courts in application of this defense.

In formulating the employer's affirmative defense, this Court expressed its desire to "accommodate the agency principles of vicarious liability for harm caused by the misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Ellerth*, 524 U.S. at 764, 118 S. Ct. at 2270. This Court noted that the primary objective of Title VII is not to provide redress, but to avoid harm. *Faragher*, 524 U.S. at 806, 118 S. Ct. at 2292:

> It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some incentive. *Id.*

Petitioner's interpretation of the second prong of the affirmative defense is incorrect because Petitioner ignores this reasoning and these policy considerations. Adoption of the theory urged by Petitioner is at odds with the statutory policy recognized by this Court, and this Court's attempt to balance the respective duties of employers and employees. It essentially holds an employer strictly liable for sexual harassment, despite the fact that the employer acted reasonably to prevent harm, and acted reasonably to promptly correct harassment that did occur once it had knowledge, and the employee did not act reasonably to prevent harm by reporting the alleged harassment before it became severe or pervasive. It would result in an affirmative defense that

is really no defense at all where the employee reports the sexual harassment, regardless of the reasonableness of the employee's actions.

The very law review article cited by Petitioner criticizes such a position, as well as the case cited by Petitioner in support of her contention. *See* David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense To Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1267, 1293 (2001). As this article points out, Petitioner's position is contrary to that of most courts that have considered the issue. "Most courts that have interpreted the affirmative defense have refused to hold employers who responded properly to complaints of sexual harassment liable for the actions of their supervisors." *Id.* at 1294. In accordance with Congress' intent, "most courts wish to reward employers for doing what they should to prevent and correct harassment." *Id.*

The Petitioner cites *Moore v. Sam's Club*, 55 F. Supp. 2d 177 (S.D.N.Y. 1999), in support of her contention that the *Ellerth/Faragher* affirmative defense is unavailable to an employer where the employee reports the alleged harassment. The New York district court found that the employer had not met the second prong of the affirmative defense. It found that the affirmative defense applied in situations where the employee failed to report the harassment despite knowing that the employer had a policy against sexual harassment. *See id.* at 192. The court concluded that employers are liable for the sexual harassment of supervisory employees, even if the employer acted reasonably, "'so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm.'" *Id.* at 193 (quoting *Ellerth*, 524 U.S. at 773, 118 S. Ct. at

2274 (Thomas, J., dissenting)). Because the employee had taken advantage of the employer's sexual harassment complaint procedure, the affirmative defense was unavailable to the employer.

However, such a result ignores this Court's requirement in the second prong of the defense that the employee report harassing conduct before it becomes severe or pervasive and creates "an incentive for employers to refrain from doing all they can to prevent and correct harassment." Sherwyn, 69 FORDHAM L. REV. at 1293.

> Under this interpretation of the law, extra effort by the employers to prevent harassment (such as elaborate and expensive so-called "sexual-harassment training" for employees) might work against companies under the affirmative defense because employees at those companies may have a greater propensity to report, which will preclude the employer from satisfying the defense. *Id.* at 1294.

Accepting the Petitioner's interpretation would cause the anomalous result of encouraging employers to provide complaint procedures, but not to make employees too comfortable in using such procedures because if an employee actually uses them, the employer is worse off when it comes to asserting the affirmative defense. *Id.* Such a result is clearly at odds with Title VII's purpose of preventing and remedying harassment.

The Fifth Circuit recognized these policy considerations in applying the affirmative defense in situations where the employer has acted reasonably. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999). The plaintiff

was subject to sexual harassment from her supervisor. She immediately reported the harassment, and the employer acted immediately to address the issue. *See id.* at 260. No further incidents of harassment occurred thereafter. *Id.*

The Fifth Circuit relied upon the principles enunciated in *Faragher* and *Ellerth* in concluding that the employer should not be held vicariously liable. *Id.* at 265. The court discussed the policy behind Title VII in reaching its conclusion. When an employee promptly complains about sexual harassment, the employee can thwart the creation of a hostile work environment, and receive the benefits that Title VII was meant to confer. *Id.* An employer's prompt response should also protect it from liability because the employer "forestalled the creation of a hostile environment." *Id.* at 266.

The *Indest* court further stated: "Imposing vicarious liability on an employer for a supervisor's 'hostile environment' actions despite its swift and appropriate remedial response to the victim's complaint would thus undermine not only *Meritor* but Title VII's deterrent policy." *Id.*

In addition to undermining Title VII's deterrent policy, the court cited the policy behind agency law in support of its conclusion:

> A standard imposing vicarious liability notwithstanding the employer's (sic) having nipped a hostile environment in the bud would also conflict with the premise of *Ellerth/Faragher*, founded in agency law, that a supervisor who creates a hostile environment is aided by his agency status with the employer in doing so . . .

> Where the company, on hearing a plaintiff's complaint about inappropriate sexual behavior, moves promptly to investigate and stop the harassment, it eradicates any semblance of authority the harasser might otherwise have possessed. *Id.*

In light of these policy considerations, the interpretation of the employer's affirmative defense urged by the Petitioner must be rejected. Any incentive to enact a proactive and efficient harassment policy would be destroyed if employers are held liable despite their best efforts to prevent and correct harassment. Employers would be encouraged to forego the time and expense of implementing an effective sexual harassment policy, and instead take their chance in litigation. Such a result would clearly be in derogation of Congress' policy in enacting Title VII and the principles enunciated by this Court in establishing an employer's affirmative defense to a hostile environment claim. It would result in an affirmative defense that is really no defense at all. Analysis of these considerations lead inescapably to the conclusion that employers such as MTL should not be held vicariously liable for sexual harassment in circumstances where the employer has acted reasonably to prevent and promptly correct harassing behavior once it learned of it.

MTL was entitled to summary judgment because it satisfied both prongs of the affirmative defense. The Petitioner does not dispute the lower courts' findings that MTL acted reasonably to prevent and promptly correct the alleged harassment. The Petitioner instead argues that an employer will always be precluded from asserting the affirmative defense whenever the employee reports the sexual harassment, whether that report was timely or not.

The Petitioner's interpretation would essentially hold an employer vicariously liable for sexual harassment whenever the employee reports the harassment, regardless of the employee's reasonableness or fulfillment of his or her duty to avoid harm.

The Petitioner thus ignores the essential inquiry of the second prong. The second prong of the affirmative defense focuses on the reasonableness of the employee's response, not simply on whether or not the employee reported the harassment.

An employer's vicarious liability for sexual harassment must be examined in light of the timing of the employee's report and the employer's subsequent response. Where the employee reports incidents of sexual harassment immediately, the employer can prevent the creation of a hostile work environment by promptly addressing the problem. Where the employee fails to promptly report harassing behavior, and severe and pervasive harassment results, the employer must still be permitted to assert the affirmative defense to a hostile work environment claim. Where the employer corrects promptly the harassing behavior upon its receipt of the employee's complaint, the affirmative defense should protect the employer from liability for all harassment that occurred prior to its receipt of the complaint in most circumstances. This interpretation of the employer's defense is consistent with the nature of an affirmative defense in general.

This Court reaffirmed its focus on reasonableness in *Faragher* where it stated, "We hold that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to

the reasonableness of the employer's conduct *as well as that of a plaintiff victim*." *Faragher*, 524 U.S. at 780, 118 S. Ct. at 2280 (emphasis added). As this Court recognized in *Faragher*, "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Id.* at 807, 118 S. Ct. at 2292.

Here, Petitioner alleges that her supervisor's harassment began shortly after she commenced employment at MTL in September 1995. Yet the Petitioner failed to report the alleged harassment to anyone in an authoritative position at MTL until March 1996. MTL began investigating Petitioner's complaint the same day it received it. The Petitioner never made any further reports of harassment, nor has she even alleged that the harassment continued beyond the date of her report.

In addition to the Fifth Circuit decision cited above, several other appellate courts have considered and rejected arguments similar to those made by the Petitioner where the employee did not promptly report the harassment to her employer.

The Seventh Circuit has been mindful of the policies behind Title VII in applying the *Ellerth/Faragher* affirmative defense. *See Gawley v. Indiana University*, 276 F.3d 301 (7th Cir. 2001). In *Gawley*, the plaintiff alleged sexual harassment against another employee the plaintiff claimed was her supervisor. The plaintiff informally attempted to stop the harassment, but did not utilize the employer's formal complaint procedure until seven months after the alleged harassment began. *Id.* at 312.

The Seventh Circuit found that the university employer had met the first prong of the affirmative defense because it had a system in place for employees to report sexual harassment, and the university took action to effectively stop the harassment as soon as the plaintiff reported it. *Id.* at 311-12. With regard to the second prong of the defense, the court held that the employee had unreasonably failed to take advantage of the university's corrective procedures because she had waited seven months to make a formal complaint. *Id.* at 312.

The court noted that the requirements of the second prong of the affirmative defense are tied to Title VII's primary objective, which is to avoid harm rather than to provide redress. *Id.* The court affirmed the lower court's grant of summary judgment in the university's favor because the plaintiff failed to take advantage of the university's procedure in a timely fashion. *See id.*; *see also Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261 (4th Cir. 2001) (holding with regard to the second prong of the affirmative defense that employee's actions had to be examined from the time the unwelcome conduct began and the employer satisfied this prong because the employee failed to timely report the alleged harassment).

The Ninth Circuit reached a similar conclusion where the plaintiff failed to report the alleged harassment until four months after the harassment had ended, and nearly two years after it had begun. *See Montero v. Agco Corp.*, 192 F.3d 856, 859, 863 (9th Cir. 1999). The employer's sexual harassment policy, and its efforts to make all employees aware of the policy, established that it had exercised reasonable care to prevent harassment. *Id.* at 862. Its prompt investigation and action after the plaintiff did complain established that the

employer acted reasonably to promptly correct the harassment. *Id.* The plaintiff's failure to report the harassment earlier established that the plaintiff had unreasonably failed to take advantage of the employer's preventive and corrective opportunities, despite her awareness of them. *Id.* at 863.

Several district courts have reached the same conclusion. In *Arnold v. Yale New Haven Hospital*, 213 F. Supp. 2d 142 (D. Conn. 2002), the plaintiff alleged that he was subjected to sexual harassment by a supervisor employed by the hospital. *Id.* at 143-44. The plaintiff did not complain of the harassment until after a particularly offensive incident allegedly occurred. *See id.* at 144. The hospital investigated the incident, and ultimately terminated the supervisor. *Id.* The plaintiff did not work with the supervisor again after he complained to the hospital. *Id.*

The court found that the hospital had satisfied both prongs of the *Ellerth/Faragher* affirmative defense. *Id.* at 149. Specifically with regard to the second prong, the court held that the hospital had met its burden of proving that the plaintiff had unreasonably failed to take advantage of its complaint procedures. *Id.* The plaintiff had not reported the prior incidents of harassment to anyone prior to the particularly offensive act allegedly occurred. *Id.* The court stated, "Since Yale-New Haven had adopted and disseminated an anti-harassment policy which could have dealt with the prior harassment and most likely would have prevented the broomstick incident, it can hardly be held responsible for conduct of [the supervisor] not reported to anyone." *Id.*

The court determined that the hospital's response must be measured from the point at which the plaintiff first reported the incident to hospital authorities. *Id.* Because the

hospital acted swiftly and completely to address the harassment once such a complaint was made, it met both prongs of the affirmative defense. *Id.*

A Florida district court reached a similar result in *Walton v. Johnson & Johnson Services, Inc.*, 203 F. Supp. 2d 1312 (M.D. Fla. 2002). Therein, the plaintiff alleged that she was subject to harassment at the hands of her supervisor. The plaintiff did not report the harassment to her employer for nearly three months after the first act of alleged harassment. *Id.* at 1323. The court found that the employer had met the elements of the *Ellerth/ Faragher* affirmative defense. *Id.* at 1325.

With respect to the second prong of the affirmative defense, the court found that the plaintiff had failed to act reasonably to prevent harm. *See id.* at 1324-25. Although it was undisputed that the plaintiff had taken advantage of the employer's preventive and corrective opportunities, the question was whether the plaintiff had acted reasonably because she failed to promptly report the alleged harassment. *Id.* at 1323-24. The court found that the plaintiff was not excused from acting in a reasonably prompt manner in taking advantage of the preventive and corrective opportunities provided by the employer, and had further failed to "otherwise avoid harm" by placing herself in situations that permitted further harassment by her supervisor. *Id.* at 1324, 1324 n.17; *see also Guerra v. Editorial Televisa-USA, Inc.*, No. 97-3670-CIV, 1999 U.S. Dist. LEXIS 10082, at *38 (S.D. Fla. June 4, 1999) (holding that employer was entitled to prevail on affirmative defense where the employee failed to promptly complain about alleged harassment because employer should not be held liable "for conduct about which he was unaware, particularly in light of Plaintiff's unreasonable failure to use available remedial opportunities, and that, once aware, Defendant took prompt, remedial action.").

A similar conclusion was reached by an Oklahoma district court applying the *Ellerth/Faragher* affirmative defense. *See Dedner v. State of Oklahoma*, 42 F. Supp. 2d 1254 (E.D. Okla. 1999). The plaintiff was allegedly harassed by her supervisor, but failed to report the harassment until approximately three months after the harassment began. *Id.* at 1260. The court found that the plaintiff had unreasonably failed to take advantage of the employer's preventive and corrective opportunities by failing to utilize its procedures until three months after the sexual harassment began. *Id.* The plaintiff failed to avoid harm occasioned by her supervisor's conduct prior to the date she made the complaint. *Id.*; *see also Mirakhorli v. DFW Management Co.*, No. 3:94-CV-1464-D, 1999 U.S. Dist. LEXIS 9344 (N.D. Tex. May 24, 1999) (holding that the employer was entitled to judgment based upon the *Ellerth/Faragher* affirmative defense where the employee failed to immediately report the harassment because the employer neither knew nor should have known about the harassing conduct until then).

Here, the Petitioner conveniently ignores her own corresponding duty to act reasonably to avoid harm. MTL has met its burden under the second prong of the affirmative defense because Petitioner unreasonably failed to avoid harm by failing to promptly report the alleged harassment by her supervisor. When she finally did so, MTL took reasonable and prompt corrective action. Had she fulfilled her duty when the alleged harassment began, MTL could have acted immediately to prevent the creation of a hostile work environment. However, in the absence of an earlier complaint, MTL cannot be held liable for conduct of which it was unaware.

The policy reasons cited above further demonstrate that MTL was entitled to summary judgment on Petitioner's Title VII claim.

II. The Questions Presented by the Petitioner are Not Unique, Nor Will the Case Have Far-Reaching Implications on Sexual Harassment Jurisprudence.

Most federal district courts and courts of appeals considering the employer's affirmative defense have applied it in accordance with the principles set forth by this Court in *Ellerth* and *Faragher*, and Congress' purpose in enacting Title VII. As this Court is well aware, the decisions applying the affirmative defense are very fact specific, and a decision denying or granting the relief requested by the Petitioner would not have far-reaching effects due to the fact-specific nature of this inquiry.

Petitioner complains that the Sixth Circuit's decision is erroneous because it does not make her whole and instead profits the alleged perpetrators. However, the Sixth Circuit's decision is in accordance with Congress' purpose in enacting Title VII. It provides an incentive to employers to prevent and promptly correct harassment, and it rewards those that act reasonably to do so by providing these employers with an affirmative defense to harassment charges. It fulfills the Congressional purpose of avoiding harm, rather than providing redress, where the employer acts appropriately.

MTL does not seek to deny the hardships that sexual harassment causes employees, particularly women, in the workplace. Nor is MTL insensitive to the need for effective preventive measures, and prompt and complete remedial measures. Its sexual harassment policy and prompt action in this case demonstrate that MTL takes allegations of such harassment very seriously.

However, employers cannot stop sexual harassment by themselves. To effectuate the deterrent purpose of Title VII, the victims of sexual harassment must do their part and take advantage of the preventive and corrective opportunities offered by their employers. They must promptly make the employer aware of the harassment. If the employee fails to do his or her part, as the Petitioner failed to do here, the employer cannot be expected to correct the harassment and should not be held liable for its occurrence.

MTL met its duty of reasonable care. However, the Petitioner failed in her corresponding duty to promptly report the harassment. The Sixth Circuit's application of the employer's affirmative defense is correct under the facts of this case.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 02-851

In the Supreme Court of the United States

KAREN WINTERS,

Petitioner,

v.

MTL SYSTEMS, INC. AND ARNOLD FIFE AND JAMES MCCRACKEN

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit Court of Appeals Did Not Apply Both Prongs of the Affirmative Defense Set Forth By This Court in *Burlington v. Ellerth* and *Faragher v. City of Boca Raton* and Did Not Properly Apply the Defense in Accordance with Both Congress' Purpose in Enacting Title VII and the Principles Enunciated By This Court in Formulating the Defense.

A. The Sixth Circuit Court of Appeals Did Not Apply Both Prongs of the Affirmative Defense to the Facts of This Case

The *Ellerth* and *Faragher* decisions specifically set forth the standard for determining employer liability for supervisor harassment in a case in which no tangible job detriment had occurred:

> **An employer is subject to <u>vicarious liability</u> to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.** When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense **comprises <u>two necessary</u> elements**: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, ***<u>and</u>***

(b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760 (1998).

[Emphasis added to original]

This Court's decision is clear that a vicarious liability standard is to be applied subject to an affirmative defense which an employer must prove both prongs. The employer's satisfaction of the reasonable care prong alone is insufficient to shield the employer.

Emphasizing the requirement that employers satisfy both prongs, Justice Thomas wrote in *Ellerth* that an employer cannot possibly prevail on a summary judgment motion in a case in which the employee reported the alleged harassment. Further, Justice Thomas (joined by Justice Scalia) interpreted the majority and concurring opinions as holding that an employee who reports sexual harassment cannot, as a matter of law, be found to have failed unreasonably to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Ellerth at p. 766-67.* Justice Thomas also opined at page 773 in *Ellerth* that "employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm". Therefore it is clear that once an employee reports sexual harassment - the affirmative defense is unavailable to the employer.

In the instant case, even assuming that MTL Systems, Inc. could establish that it acted reasonably to prevent and

correct violations, the *Ellerth* defense still required MTL Systems, Inc. to demonstrate that Karen Winters "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." MTL Systems did not satisfy this requirement.

The District Court incorrectly ruled (and the Sixth Circuit incorrectly affirmed) that "[t]o avail itself of the *Ellerth/Faragher* defense, an employer must show that it took reasonable care to prevent sexual harassment and to cure any incidents which happened." *See p. 11-12, District Court's opinion.* The lower court then analyzed this first prong of *Ellerth/Faragher* only for two pages, concluding that MTL was not liable for sexual harassment of Winters by McCracken "[b]ecause MTL took reasonable steps to prevent sexual harassment and to cure what it was told had happened..." *See page 14, District Court's Opinion.*

The District Court and Sixth Circuit stopped their analysis with the first prong of the defense, and neither found nor analyzed whether Winters "unreasonably failed to take advantage of any preventive or corrective opportunities provided" by MTL or, similarly, that her report of sexual harassment was untimely or otherwise defective. As Respondents even acknowledge, the District Court and Sixth Circuit "did not expressly make a specific finding with regard to the second prong of the affirmative defense..."

In an attempt to cover up the deficiency of the District Court and Sixth Circuit's incorrect analysis and cherry-picking of one of the two required, joint elements of the defense, Respondents only argue that consideration of the second prong "was inherent" in the court's decision. Try as they may, Respondents argument does not cure the District Court and Sixth Circuit's misapplication of prevalent sexual

harassment law issued from this Court. Before *Ellerth*, the District Court and Sixth Circuit's analysis and decision would have been acceptable inasmuch that courts were allowed to hold that an adequate response to a supervisor's harassment by itself insulated the employer from liability for that harassment. After *Ellerth*, however, employers are held to be liable if the employee reasonably utilized an employer's complaint procedure or avoided harm. *See Moore v. Sam's Club and Watts v. Kroger Co., supra.*

The lower courts' finding and analysis demonstrates that MTL did not satisfy both prongs of the *Ellerth/Faragher* affirmative defense, and therefore summary judgment on Petitioner's Title VII claim was not warranted.

B. The Sixth Circuit Court of Appeal's Decision is Inconsistent with Both Congress' Purpose in Enacting Title VII and the Principles Enunciated By This Court in Formulating the Defense.

Petitioner's interpretation and reading of *Ellerth/Faragher* is neither erroneous nor inappropriately narrow, as Respondents suggest. While the facts of *Ellerth/Faragher* are not on point with the facts in Petitioner's case, the substantive law of *Ellerth/Faragher* was set forth to establish the appropriate standards for employer liability in cases where a supervisor creates a sexually hostile working environment without imposing any tangible job detriment. This is the exact issue in the instant case.

In formulating the appropriate standard in *Ellerth/Faragher*, this Court indicated its desire to "accommodate the agency principles of vicarious liability for

harm caused by the misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Ellerth at 764*. Moreover, the Court stated that beyond pure agency considerations, its rule ought to reflect Title VII's concern with "the creation of antiharassment policies and effective grievance mechanisms," especially "Congress' intention to promote conciliation rather than litigation in the Title VII context and the EEOC's policy of encouraging the development of grievance procedures." *Ellerth, 524 U.S. at 764*.

Petitioner's interpretation of the second prong clearly does not "ignore the reasoning and policy considerations of Title VII." To the contrary, Petitioner's interpretation focuses on the Court's desire to accommodate two issues, one of which was to "accommodate the agency principles of vicarious liability for harm caused by the misuse of supervisory authority." Petitioner's interpretation is drawn directly from this Court's explanation of the affirmative defense available to an employer. This Court set forth the prongs of the affirmative defense only after outlining Title VII's purpose, therefore it seems logical that the prongs incorporate any and all reasoning and policy considerations of Title VII. Furthermore, Petitioner's interpretation merely reiterates the importance that in order to avail itself of an affirmative defense, an employer must show that it acted reasonably and that the employee acted unreasonably.

Respondents statement that "Most courts that have interpreted the affirmative defense have refused to hold employers who respond properly to complaints of sexual harassment liable for the actions of their supervisors" simply illustrates Petitioner's point that certain lower courts' (along with the District Court and Sixth Circuit) are misapplying the

Ellerth/Faragher defense and in a way never intended by this Court.

While several lower courts are still misapplying the defense and incorrectly focusing just on the first prong of the defense, in order to issue result-oriented decisions, they are nonetheless misapplying the defense. As both Petitioner and Respondent cite, in *Moore v. Sam's Club, 55 F.Supp.2d 177 (S.D. NY 1999)*, the court there first held that Sam's Club had exercised reasonable care both in formulating its policy and in responding to the complaint. *Moore at 191.* The court then held, however, that Sam's Club could not prevail on the second prong of the defense because the plaintiff took full advantage of the preventative measures provided, and therefore had not acted unreasonably. *Id. at 192.* Thus, Sam's Club did everything it could have, but still lost the argument because the plaintiff also had acted appropriately.

Further, in *Watts v. Kroger Co., 147 F.3d 460 (5th Cir. 1998)*, the Fifth Circuit initially affirmed summary judgment in favor of the employer on the ground that the employer took prompt remedial action after Watts complained to her store manager that her supervisor was harassing her. After the *Ellerth* decision was handed down, however, the Fifth Circuit withdrew its opinion and subsequently reversed its judgment on the grounds that the employer could not, as a matter of law, establish that Watts "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."

Accepting Petitioner's interpretation would not logically cause the "anomalous" results suggested by Respondents on page 11 of their brief. This Court's decision is clear: an employer must exercise reasonable care to prevent and correct promptly any sexually harassing behavior, ***and***

the employee must have unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth* at 765. Failure to satisfy either of the prongs, subjects the employer to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *Id.* Petitioner's interpretation is the Supreme Court's interpretation and merely follows the precise wording of the *Ellerth/Faragher* defense. Finding reasonable conduct on the employer and employee's part is undoubtedly the gist of the affirmative defense, and that is why this issue is before this Court today - the District Court and Sixth Circuit did not make an implied or express finding that Petitioner (employee) acted unreasonably. As such, Respondents were not entitled to summary judgment.

II. The Questions Presented Are Important and the Decision of the Sixth Circuit Adversely Impacts Members of Protected Classes, and Eradicates the Benefits of Title VII

Because circuits, such as the Sixth, are issuing result-oriented decisions and focusing mostly (if not exclusively) on the employer's preventive policies and corrective action taken in response to complaints of sexual harassment, the goals, principles and guidance set forth in *Ellerth* and *Faragher* are not being accomplished or followed. Instead, lower courts are misapplying the defense, and thus employers are being held not liable for actionable hostile environments created by their supervisors with immediate (or successively higher) authority over victimized employees.

Ellerth and *Faragher* are controlling authority on this issue in the Sixth Circuit, but the substantive law of both

decisions has been flatly ignored by the district court and the Sixth Circuit. Furthermore, the Sixth Circuit's affirmance of the district court's decision is contrary to, and is a departure from, the law set forth by this Court in *Ellerth* and *Faragher*. It further ignores United States Supreme Court precedent and this Court's bestowing on lower courts and employers of specific guidance on how to handle sexual harassment claims. The Sixth Circuit's decision is incorrect and erroneous as a matter of law.

An important part of the legacy of *Faragher* is not merely the recognition that traditional agency principles make employers liable for the discriminatory behavior of their supervisory employees, but rather that the behavior that Title VII aims to preclude is behavior that unfairly keeps women out of the workplace by making it too hostile for them to stay there. Benjamin E. Griffith, *Sexual Harassment in the Public Workplace* (2001), at p. 9. Its provision of an affirmative defense for environmental claims not involving tangible job detriments illumines what the Court sees as the purpose of Title VII: not merely to permit lawsuits, but rather to encourage an end to discrimination in the workplace by putting a price tag on anything short of zero-tolerance. *Id.*

The Sixth Circuit's decision impacts female employees' rights to protect themselves, and seek remedy for, such harassment and discrimination by supervisors who are aided by (1) their authority and ability to hire, fire and affect the terms and conditions of female workers and (2) their proximity and regular contact which affords them access to a captive pool of potential victims.

The Supreme Court needs to accept *certiorari*, and bring the Sixth Circuit into compliance with 42 U.S.C. §2000e, Title VII of the Civil Rights Act of 1964, as well as

this Court's decisions in *Ellerth* and *Faragher*. Otherwise, chaos will exist and the purpose of Title VII and *Ellerth* and *Faragher* will continue to be subverted and not accomplished. Respondent's Brief in Opposition demonstrates why the Petition should be granted, because it demonstrates the confusion surrounding the proper application of the law.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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